Supreme Court, U.S.
FILED

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No. 00-

IN THE

Supreme Court of the United States

SAMUEL KOHN,

Petitioner,

v.

AT&T CORP., THE WORLDPARTNERS COMPANY, BRUCE LEASURE, and KAMIE ZARACKI,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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19 pp

QUESTIONS PRESENTED

1. Was the Court of Appeals correct in rejecting as sworn "affidavits" required by Fed. R. Civ. P. 56, "certifications" which are treated as sworn under the penalties of perjury under New Jersey law and routinely used and accepted in Federal District Court in New Jersey?

Petitioner submits that the Court of Appeals was in error and should have treated such sworn "certifications" as "affidavits" under Rule 56, admissible for all purposes under that Rule.

2. Was the Court of Appeals correct in denying petitioner's writ of mandamus, or otherwise correcting on appeal the District Court's failure to remand the action to the state court from which it was removed pursuant to 28 U.S.C. § 1447, where the case was otherwise ready for trial, had originally been removed to Federal Court, and the Statute of Limitations for filing a new action in State Court had expired?

Petitioner submits that the Court of Appeals was in error and abused its discretion in denying the writ of mandamus, or otherwise correcting on appeal, the District Court's failure to remand the action under 28 U.S.C. § 1447.

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OPINIONS BELOW

On March 14, 2001, the United States Court of Appeals for the Third Circuit issued its unpublished opinion, affirming the decision of the District Court and denying Petitioner's request for a writ of mandamus, and filing an Order to that effect (1a). The District Court's letter-opinion and order thereon were filed June 22, 1999 (97a), and its order denying reconsideration were filed July 20, 1999 (98a).

STATEMENT OF JURISDICTION

Petitioner seeks review of the opinion of the United States Court of Appeals for the Third Circuit and its judgment of March 14, 2001. That judgment affirmed the lower court's grant of summary judgment and denied petitioner's request for a writ of mandamus. Petitioner invokes the certiorari jurisdiction conferred on this Court by 28 U.S.C. § 1254(1).

STATUTE AND RULES INVOLVED

Fed. R. Civ. P. 56:

> (a) A party . . . may . . . move with or without supporting affidavits. . . .
>
> (c) . . . The adverse party prior to the day of hearing may serve opposing affidavits. . . .

New Jersey Rules 1:4-4. Affidavits:

> (b) Certification in Lieu of Oath. In lieu of the affidavit, oath or verification required by these rules, the affiant may submit the following

> certification which shall be dated and immediately precede the affiant's signature: "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment."

28 U.S.C. § 1447(c):

> . . . If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. . . .

STATEMENT OF THE CASE

This action asserted causes of action by Petitioner, a twenty year employee of AT&T, against AT&T, its affiliate The WorldPartners Company and two of their employees. The causes of action included violations of the New Jersey whistle-blower statute, N.J. Stat. Ann. 34:19-1, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e)-1, the Age Discrimination in Employment Act, 29 U.S.C. § 621, the Americans with Disabilities Act, 42 U.S.C. § 12101, and defamation. All the causes of action were filed in New Jersey State Court; the claims under Title VII, Age Discrimination and the ADA, were filed in Superior Court, Law Division on November 24, 1998, after receipt of a Right-to-Sue letter from the EEOC, and the claims under the whistle blower statute and for defamation were filed in Superior Court, Chancery Division. The defendants timely removed the Law Division action to the United States District Court for the District of New Jersey on January 8, 1999. Kohn filed an amended complaint with the District Court on January 21, 1999, adding the whistle-blower claims and for defamation.

The parties stipulated that the causes of action commenced as of June 4, 1998, when the initial complaint was filed in Chancery Division; the Chancery Division complaint was then dismissed to permit all claims to be heard together in Federal District Court.

Discovery and pretrial proceedings went forward in Federal District Court and trial was set for June 1, 1999. Defendants' motion for summary judgment was filed in May, 1999; the District Court's opinion was filed June 22, 1999. Plaintiff's motion for reconsideration was denied July 20, 1999. Petitioner here petitioned for mandamus to compel the District Court to remand the state claims to the New Jersey Superior Court. Thereafter, Petitioner appealed. In a Memorandum Opinion marked "Unreported-Non-Precedential" and dated March 14, 2001, the Court of Appeals for the Third Circuit affirmed the District Court and denied the petition for the writ of mandamus.

REASONS FOR GRANTING THE WRIT

Federal District Courts and Federal Circuit Courts of Appeal routinely permit the use of affidavits, affirmations or other documents "sworn" under local law to meet the standards of Rule 56 which requires "affidavits". New Jersey has a procedure for a "certification" which is only another way or swearing or affirming without the presence of a notary public. Yet the Third Circuit Court of Appeals upheld the District Court's conclusion that such "unsworn declarations not filed under penalty of perjury fail to satisfy the requirements of Rule 56".

Summary Judgment is a drastic remedy which cuts off the litigant from presenting evidence to the trier of fact at a trial. At the same time, it is an important tool in the administration of justice helping the court to determine which matters must be tried and which do not need a trial. Petitioner submits that there is no principled reason why certifications sworn under State law should be considered any less reliable than affidavits sworn under State law before a state notary. This decision by the Third Circuit Court of Appeals is not followed, so far as research has disclosed, in any other Court of Appeals with respect to documents considered sworn under state law. This Court should exercise its prerogative to correct the Third Circuit Court of Appeals in a fundamental use of "sworn documents" in this most important area of summary judgment, and to bring the Third Circuit into conformity with the procedure followed by the other Courts of Appeal.

Under our federal system of laws, parties are free to file actions in state court, which actions, under certain criteria, Congress has declared may be removed to Federal Court. However, Congress has provided in § 1447, that the action "shall be remanded" if, at any time, it appears that the District Court lacks subject matter jurisdiction. Failure to follow that course of action set out by Congress will result in the inability of petitioner here to file his whistleblower action under New Jersey law, which requires such an action to be filed within one year. This action, encompassing federal and state causes of action, was fully ready for trial, and had been set for trial, at the time that the District Court granted summary judgment, dismissing the federal causes of action. The failure of the District Court to follow the mandatory procedure of § 1447 (or to maintain jurisdiction in the Federal Court over the whistleblower cause of action) necessarily prevents

petitioner from filing a new action in state court, because the one year statute of limitations had already expired. This Court should grant certiorari to compel the remand of the action in accordance with the mandate of the statute.

I. DOCUMENTS SWORN UNDER STATE LAW SATISFY THE RULE 56 REQUIREMENT FOR "AFFIDAVITS"

The Court of Appeals ignored the local procedure adopted by New Jersey (similar to the procedure adopted by the United States, and certain other states) setting out a certification procedure for documents, which, as the New Jersey Appellate Division has noted, "is only another way of swearing or affirming," without the presence of a notary. *State v. Angelo's Motor Sales*, 125 N.J. Super. 200, 207 (App. Div. 1973), *aff'd sub nom. State v. Parmigiani*, 65 N.J. 154 (1974). That procedure, set out in New Jersey Rules 1:4-4(b), requires the declarant to say "I am aware that if anything herein is false, I am subject to punishment."[1] The rule permits a certification to be used in lieu of any sworn statement, for, "it may well be, in fact, that laymen will be more impressed by the gravity of their act by the language of the certification than by the present jurat method." Tentative Draft Comment to Rule 1:4-4.[2]

1. The Federal counterpart, 28 U.S.C. § 1746, uses the phrase "penalty of perjury" rather than New Jersey's use of the phrase "I am subject to punishment." As the Comment to the New Jersey Rule notes, that language was intended to comprehend both punishment for contempt of court as well "as a penalty imposable for wilfully false statements, prosecution for perjury or false swearing." Comment 2 to Rule 1:4-4.

2. It should be noted that, in the reply, opposing counsel made no objection that the certifications were unsworn, or did not

(Cont'd)

Because the United States does not license notaries public, it is submitted that most "affidavits" submitted are sworn to before state-licensed officials, and are governed by the state rules as to what constitutes sworn statements.[3] It is submitted that an inspection of the files of the District Courts will demonstrate that certifications under New Jersey law are routinely filed, accepted and treated as the equivalent of affidavits.[4]

It is respectfully submitted that the Third Circuit Court of Appeals apparently overlooked this procedure when it called "certifications" submitted by plaintiff and his counsel under the New Jersey Rules as "unsworn" somehow not to be given the same weight accorded "affidavits" whose

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constitute affidavits, and therefore should not be considered by the Court. The Court raised this point *sua sponte*. No oral argument on the motion was set by the Court and counsel were advised that if the Court desired oral argument they would be contacted. No communication was received from the Court with respect to this motion after it was submitted, until receipt of the Letter-Opinion.

3. Requirements differ among states. New Jersey permits an attorney to take oaths and to attest to an affidavit. New York does not permit an attorney to take oaths; only notaries public may do so. The Federal courts routinely accept oaths as permitted by local state law. Petitioner here submitted an affidavit on his motion for rehearing below attesting to his understanding that his signature on the certification meant that he was thereby subject to the penalties of perjury.

4. *E.g.*, in *Tsolakis v. AT& T Corp.*, Civil Action No. 99-5418, District of New Jersey, summary judgment was granted to Defendant AT&T based upon New Jersey certifications it submitted.

only validity flows from their having been signed before New Jersey-licensed notaries public.[5]

The Court Appeals did not discuss the question except to say that "The District Court did not err in this respect." (12a) The District Court said in its Letter-Opinion, at 54a,

> Unsworn declarations not filed under penalty of perjury fail to significantly legitimize claims. *See Small*, 98 F.3d at 765 n.5 (citing *Adickes*, 398 U.S. at 158 n.17); *Pastore*, 24 F.3d at 511; *Radich*, 886 F.2d at 1394; *Branella*, 972 F. Supp. at 300; *Maietta*, 749 F. Supp. at 1362; *Fucci*, 969 F. Supp. at 315 n.8 [referring back to n.1, 24a].

However, the *Small*, *Adickes*, *Pastore*, *Radich*, *Maietta* and *Fucci* decisions do not deal with certifications that comply with the New Jersey Rule. *Small*, *Pastore*, *Radich* and *Fucci* arise out of the Pennsylvania district court and deal with unsworn statements or unsworn memoranda, none of which are apposite here. *Maietta*, at the location cited, relates to an unsworn statement of counsel and has no reference therein to certification nor to the penalty of perjury.

---

5. Perhaps because it considered the Certifications to be unsworn, and therefore unworthy of acceptance, the Court apparently overlooked that there is a direct conflict between much of the testimony given by defendant Zaracki and that given by plaintiff in his sworn certification and in the sworn deposition submitted in full to the Court. On a motion for summary judgment, it is not the Court's function to determine Zaracki's credibility (supported by her own self-serving documents which she created) as against plaintiff's credibility. That is a question for the jury.

Only *Branella*, a single opinion out of the District of New Jersey, refers to certifications such as those here, and that opinion makes no reference to the New Jersey Rule authorizing such certifications in lieu of an affidavit, and apparently did not consider that Rule, nor that the "punishment" referred to comprehends penalties for perjury as well as false swearing and contempt of court. See the Official Comment to Rule 1:4-4 of the New Jersey Rules.

Accordingly, it is respectfully submitted that New Jersey Certifications, just as well as affidavits attested to by a New Jersey Notary (or an attorney authorized in New Jersey to attest to oaths) should all fully satisfy the purpose of the requirement for an "affidavit" under Rule 56.

In his Order denying Plaintiff's motion for reconsideration, the District Court states that the Certifications were "accepted" and were "substantively considered and analyzed in detail", but the Court never accepted them or considered them as *sworn* declarations satisfying the requirements of Rule 56 for an affidavit[6]. Accordingly, the District Court's opinion treats the statements in the Zaracki affidavit as uncontroverted by sworn evidence[7], despite the fact that they are squarely

6. Rule 56 does not require affidavits to state "sworn to under the penalty of perjury"; indeed the affidavits filed below by respondents here did not so state. This matter is apparently also left by the Rule to the practise of the several States.

7. For example, the District Court dismissed Kohn's claim that certain conduct was infected with illegality by quoting *Zaracki's* (non-lawyer) statement (in October, 1996) that there was no legal

(Cont'd)

controverted by the Kohn Certification and the extensive depositions submitted. This failure to consider them as sworn evidence is particularly unfair because there are no Court of Appeals cases, or cases in this Court, which hold that papers which are deemed to be sworn under local law will not be considered sworn under Rule 56. Moreover, defendants never raised that point in their papers, and so plaintiff had no opportunity to contest this matter on the motion, which the Court deemed submitted without oral argument.

By treating the Kohn Certification as unsworn, the District Court and the Court of Appeals ignored their obligation to resolve all doubts as to the existence of genuine issues of fact against the moving party, *see Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), and to resolve "all inferences, doubts, and issues of credibility . . . against the moving party", *Meyer v. Riegel Prods. Corp.*, 720 F.2d 303, 307 n.2 (3d Cir. 1983), *cert. denied*, 465 U.S. 1091 (1984), thus resulting in the summary judgment motion being granted, rather than denied.

(Cont'd)

problem, without noting that Kohn's certification set out that these legal problems he pointed out were the subject of continuing discussion and work by the AT&T lawyers assigned to WorldPartners well into and past March, 1997, six months later.

II. THE STATE CLAIMS SHOULD HAVE BEEN REMANDED

As the Court of Appeals noted in its opinion, all the claims in this case were originally commenced in State Court by defendants (10a). The claims were all consolidated in this case which was removed to United States District Court by defendants. Accordingly, under § 1447(c), "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."

In its explanation of the dismissal (95a, *l.*15), the District Court quotes the United States Supreme Court in *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343 at 350 (1988), "When the Federal-law claims have dropped out of the lawsuit in its early stages. . . ." Yet the court nowhere notes that this case is not "in its early stages," but that the district court had set a firm trial date for June 2, 1999, and that all proceedings, including the final pretrial order, charges to the jury, etc., had been concluded. This motion, initially submitted by defendants' counsel May 7, 1999 was not put on the district court's calendar until May 24, roughly one week before the firm trial date of June 1, 1999 that had been set by the court months before, and a date consistently reaffirmed thereafter.

In any event, it is submitted that the court having determined there was not jurisdiction by virtue of the Federal claims, the court had no discretion to dismiss the remaining State claims, rather than remand them. Under § 1447, the language is clear and unambiguous that "the case *shall* be remanded" (emphasis added).

CONCLUSION

Certiorari should be granted to assure uniformity of treatment among the Circuit Courts of Appeal and the District Courts of documents validly sworn under State law.

Further, Certiorari should be granted to assure compliance by the lower courts with the mandate of 28 U.S.C. § 1447 that where it appears at any time that the District Court does not have subject matter jurisdiction, the case *shall* be remanded to the State Court from which it was removed.

Respectfully submitted,

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APPENDIX

APPENDIX A — MEMORANDUM OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED MARCH 14, 2001

UNREPORTED - NOT PRECEDENTIAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 99-5597

SAMUEL KOHN,

Appellant

v.

AT&T CORP., WORLDPARTNERS COMPANY, THE;
KAMIE ZARACKI

NO. 99-5854

IN RE:

SAMUEL KOHN,

Petitioner

On Petition for a Writ of Mandamus to and
On Appeal From the United States District Court
For the District of New Jersey
(D.C. Civil Action No. 97-cv-00102)
District Judge: Honorable Alfred J. Lechner, Jr.

Submitted Under Third Circuit LAR 34.1(a)
December 11, 2000

Appendix A

Before: SCIRICA, AMBRO, *Circuit Judges*,
AND POLLAK, *District Judge**

(Filed: MAR 14 2001)

MEMORANDUM OPINION

AMBRO, *Circuit Judge*

Samuel Kohn ("Kohn") appeals the entry of summary judgment against him in favor of Appellees AT&T Corporation, The World Partners Company, and Kamie Zaracki by the United States District Court for the District of New Jersey with regard to claims of violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e)-1 ("Title VII"), the Age Discrimination in Employment Act, 29 U.S.C. § 621 (the "ADEA"), the Americans with Disabilities Act, 42 U.S.C. § 12101 (the "ADA"), the New Jersey Conscientious Employee Protection Act, N.J. Stat. Ann. 34:19-1 ("CEPA"), and defamation. Mr. Kohn has also petitioned this Court for a writ of mandamus compelling the District Court to remand the state claims to the New Jersey Superior Court. We affirm the District Court's order, and deny Mr. Kohn's petition for a writ of mandamus.

Kohn began working for AT&T in February, 1977. In March of 1996, Kohn accepted an assignment with World Partners Company ("WPC"), an affiliate of AT&T.

---

* The Honorable Louis H. Pollak, Senior District Judge for the Eastern District of Pennsylvania, sitting by designation.

Appendix A

Kohn became Manager of Pricing and Business Analysis, where he was responsible for, among other things, negotiating an Integrated Global Discount ("IGD") program among various telephone companies and for compiling and maintaining a price book which analyzed prices charged by telephone companies. Kohn reported to Kamie Zaracki ("Zaracki"), the Director of Marketing and Acting Vice-President of Marketing for WPC. In September of 1996, Bruce Leasure became Zaracki's boss as the Vice-President of Marketing.

Complaints about Kohn's work performance surfaced in the second half of 1996. Zaracki met with Kohn in August of 1996 to discuss a "Career Plan Summary" for him.[1]

---

1. The Career Plan Summary states, in relevant part:

> [K]ohn desires to further his advancement within AT&T and to obtain an overseas assignment. To indicate his readiness for such advancement, [Kohn] must demonstrate:
>
> (1) Subject matter expertise in the area of international pricing and the relevant WPC/WPA processes and policies associated with influencing of pricing strategy WorldSource[SM] Services across the Association.
>
> (2) Successful leadership of a broad range of Partnership, WPC and Member teams in the achievement of mutual goals/objectives for WorldSource[SM] Services.
>
> * * * *
>
> To facilitate this personal development, [Kohn] should concentrate his efforts in the following areas:
>
> (Cont'd)

Appendix A

Following the August, 1996 meeting, Zaracki stated that she continued to receive complaints about Kohn's work performance and his interactions with other employees, and she personally observed his failure to meet commitments and manage projects.

These complaints resulted in an October 1996 "feedback session" wherein Zaracki provided Kohn with a written Development Plan detailing her expectations for him for the remainder of 1996.[2] At this session, Zaracki stated that she

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(Cont'd)

> (1) Improving his interpersonal skills and cultural awareness by demonstrating effective relationship management with peers, customers and suppliers — recognizing cultural differences and modifying his management approach to their needs.
>
> (2) Improving his ability to plan and organizing work activities. [Kohn] must focus on 'making it easy' for others to support his projects, complete activities necessary for WPC success, etc.
>
> (3) Demonstrate his willingness and ability to help others succeed while ensuring that his business objectives are also being met. This will require [Kohn] to successful [sic] multi-task while producing quality work on time.

Career Plan Summary, App. at BA9.

2. The Development Plan provided detailed instructions:

> 1. Contact EAP
>
> — Carol Caudill (908) 234-3383

(Cont'd)

Appendix A

(Cont'd)

2. Complete all documentation required to support IGD Trial by 11/22

— Trial processes, documentation, job aids

— Member communications material

— Review with supervisor prior to distribution, incorporate any required changes

3. Complete distribution of relevant IGD communications material to Members by 11/27. Conduct teleconference with Members participating in the trial by 12/6.

4. Complete development and delivery of price book update process by 11/22.

— Process flow and associated documentation

— Executed once for PL

— Distribute updated PL price book to Member/ WPC PL Product Managers

— Review with supervisor prior to distribution, incorporate any required changes

5. Develop draft of WorldSource Pricing Strategy Document by 12/10

— WPC document format required

(Cont'd)

discussed with Kohn numerous examples of his inappropriate behavior and performance deficiencies. According to Zaracki, Kohn did not satisfactorily complete the Development Plan.[3]

(Cont'd)

— Review with supervisor, incorporate any required changes

6. Continue to manage and support GPP

— Meeting scheduled, minutes prepared and distributed

7. Schedule 2-one hour status meetings per week with supervisor

— One each at the beginning and end of the week

— Be prepared to provide written action plan on what will be accomplished that week during the beginning- of-week meeting and status of what was accomplished during the end-of-week meeting

— Content related meetings are to be scheduled in addition to meetings as needed.

Development Plan, App. at BA12.

3. The progress of Kohn was summarized in Kohn's "Status of Performance Document," which states:

1. [Kohn] did not contact EAP.

(Cont'd)

Appendix A

In February, 1997, Zaracki met again with Kohn to discuss his performance. Zaracki provided Kohn with a Performance Appraisal spanning the time period from March 15, 1996 to December 31, 1996. The Appraisal notes that while "[Kohn] successfully developed the WPC proposal for global discounts (IGD) and reviewed it with Members and Partners," he "did not effectively manage the IGD concept into a workable plan" nor did he "complete the

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(Cont'd)

> 2. [Kohn] did not complete IGD Trial documentation by 11/22. Progress was so slow and IGD team members were becoming so frustrated with the lack of effective project management displayed by Sam that I (Kamie Zaracki) took over the project manager role for the IGD and removed [Kohn] from the project.
>
> 3. [Kohn] did not complete these activities because he was removed from the project.
>
> 4. [Kohn] did not complete these activities by 11/22. They were completed week of 2/16/96.
>
> 5. [Kohn's] outline of the Strategic pricing document was not acceptable. He did not incorporate my comments by 12/20, nor did he revise the outline as requested.
>
> 6. It was not necessary to hold a GPP meeting.
>
> 7. [Kohn] did schedule regular meetings with his supervisor.

Status of Performance Document, App. at BA15-16, n.8.

IGD process development and trial documentation in the time frame required." App. at BA22. As a result, "the trial start date, which was the President's commitment to the Partners, was in jeopardy" and Kohn was removed from the project. *Id.* The Performance Appraisal, while noting Kohn completed a draft outline of the pricing strategy document, also notes a lack of detail necessary for the draft outline, delays in updating the price books, and ineffective project management. App. at BA22-23. Consequently, Kohn received a "Partially Met" performance rating and was given the option of either being placed on a Performance Improvement Plan ("PIP"), which provided for the termination of his employment if he failed to improve within sixty days, or searching for another full-time position within AT&T for sixty days. Kohn was placed on the PIP by default for failing to sign the election form.

Because Kohn failed to meet the requirements of the PIP, Zaracki recommended that he be terminated from his employment with WPC. The May 8, 1997 letter notifying Kohn that he was terminated cited that he had not met the terms of the PIP, and stated he had thirty days to find another position within AT&T. By letter dated May 30, 1997, Kohn was provided a thirty-day extension to locate employment within AT&T. He continued on the AT&T payroll until June 20, 1997.

Kohn alleges that he failed to complete the IGD and pricing projects because communications among telephone companies potentially violated antitrust laws. However, a memorandum sent by Zaracki to Kohn, dated October 29, 1996, informed Kohn that there were no legal impediments

to completing his assignments, and directed him to do so. Kohn counters, though, that the antitrust issues were the subject of continuing discussion into March of 1997 among AT&T lawyers assigned to WPC.

Kohn further alleges that he informed Zaracki he suffers from Attention Deficit Disorder ("ADD"), and requested accommodations. In November of 1996, Zaracki forwarded a "Request for Employee Fitness Evaluation" to Health Affairs to have Kohn evaluated for ADD. Dr. Joseph Cillo evaluated Kohn, and forwarded his evaluation to Zaracki in February of 1997. Dr. Cillo's evaluation stated that "if optimally managed [his condition] should not interfere with his ability to perform his job. . . ." App. at BA20. Kohn asserts that Zaracki failed to follow Dr. Cillo's instructions, specifically that she refused to hold weekly meetings and failed to provide him with meaningful feedback and documents needed to complete his assignments.

Zaracki responds that

> [t]he sole reason for Kohn's termination was his poor work performance. Neither Kohn's age, religion, his ADD, nor any legal issues and/or concerns he may have raised during his assignment to WPC, played any part in this decision, or for that matter any other employment action taken with respect to Kohn.

App. at BA29.

Appendix A

II.

Kohn filed his initial complaint in the Superior Court of New Jersey, Chancery Division, Bergen County ("Chancery Division"), on June 4, 1998, alleging violations of CEPA and defamation. The Chancery Division dismissed the complaint without prejudice.

Kohn filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), and claims to have received a Right-to-Sue letter from the EEOC on September 1, 1998. He filed a subsequent complaint in the Superior Court of New Jersey, Law Division, Bergen County, on November 24, 1998, alleging a pattern and practice of discrimination against him in violation of Title VII, the ADEA and the ADA. On January 8, 1999, the defendants timely removed this action to the United States District Court for the District of New Jersey.

Kohn filed an amended complaint with the District Court on January 21, 1999, which included his federal claims and added state claims of defamation and violations of CEPA. The parties stipulated that the causes of action commenced as of June 4, 1998, when the initial complaint was filed in the Chancery Division.

The Appellees filed an answer on March 10, 1999 and moved for summary judgment on May 7, 1999. The District Court granted summary judgment in favor of AT&T, WPC, and Zaracki as to all the federal claims, and dismissed the state law claims without prejudice, declining to exercise supplemental jurisdiction pursuant to 28 U.S.C. § 1367. We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

Appendix A

III.

This Court exercises plenary review with respect to review of a District Court ordering summary judgment. *See Stanziale v. Jargowsky*, 200 F.3d 101, 105 (3d Cir. 2000). "Summary judgment is proper where the pleadings, depositions, answers to interrogatories, admissions, and affidavits show there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Jones v. School Dist. of Philadelphia*, 198 F.3d 403, 409 (3d Cir. 1999); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

When considering a motion for summary judgment, all evidence submitted must be viewed in a light most favorable to the party opposing the motion. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Seitzinger v. Reading Hosp. & Med. Ctr.*, 165 F.3d 236, 238 (3d Cir. 1999); *Meyer v. Riegel Prods. Corp.*, 720 F.2d 303, 307 n.2 (3d Cir. 1983) (stating court must resolve "all inferences, doubts, and issues of credibility . . . against the moving party"), *cert. denied*, 465 U.S. 1091 (1984).

When the nonmoving party bears the burden of proof at trial, the moving party is entitled to summary judgment by showing "there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325. The nonmoving party must come forward with "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.' " *Matsushita*, 475 U.S. at 587

(citing *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289 (1968)). "The import of these subsections is that . . . the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied." *Celotex*, 477 U.S. 323.

As an initial matter, Kohn argues on appeal that the District Court erred in failing to treat certifications as sworn statements under Fed. R. Civ. P. 56. Kohn and his attorney did not submit affidavits in opposition to the motion for summary judgment, instead submitting certifications that failed to acknowledge their contents were submitted under penalty of perjury. The Court concluded that such "unsworn declarations not filed under penalty of perjury fail to satisfy the requirement of Rule 56," relying on *Small v. Lehman*, 98 F.3d 762, 765 n.5 (3d Cir. 1996) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158 n.17 (1970)) and supporting caselaw from this Court and the District Courts in New Jersey and Pennsylvania. The District Court did not err in this respect. Moreover, the District Court accepted both the Kohn Certification and the Freedman Certification under Fed. R. Civ. P. 11 and 56(g), once again undermining Kohn's argument.

The second issue Kohn raises on appeal is whether summary judgment was proper, considering the material controverted issues of fact in this case. While agreeing that the summary judgment standard used by the District Court in this case was correct, Kohn claims that the Court failed to resolve all doubts against the moving party.

The fact that the District Court cited largely to direct evidence offered by Appellees in the form of internal documentation of Kohn's Career Plan, Development Plan, and Status of Performance, and to Zaracki's sworn deposition testimony, does not constitute a failure to resolve all inferences in Kohn's favor contrary to the summary judgment standard. Rule 56 directs a court to consider "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits." Fed. R. Civ. P. 56(c). Moreover, the District Court's analysis in its letter opinion and in the order denying Kohn's Motion for Reconsideration under Rule 56(g) satisfies us that it considered the entire record as Rule 56(c) prescribes. After reviewing the record, the District Court's thorough eighty-three page letter opinion, and its Order denying the Motion for Reconsideration, we agree that the District Court correctly stated the summary judgment standard to be employed in this case, and properly applied it to the record.

The summary judgment burdens are not entirely one-sided. Once the movant demonstrates an essential element of the non-movant's case is lacking, the non-movant must come forward with sufficient evidence to demonstrate that there is a factual controversy as to that element. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). If the non-movant fails to make a sufficient showing regarding an essential element of its case upon which it will bear the ultimate burden of proof at trial, all other facts are necessarily immaterial and summary judgment must be granted. *See Celotex*, 477 U.S. at 321; *accord Seigel Transfer, Inc. v. Carrier Express, Inc.*, 54 F.3d 1125, 1130-31 (3d Cir. 1995). In this matter, whether Kohn is qualified for his position is

the essential element of the *prima facie* case in each of his discrimination claims, and one which he fails to prove.

With Kohn's summary judgment burden in mind, we turn to the District Court's analysis of his discrimination claims. Absent direct evidence of purposeful discrimination, this Court has held that the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), refined in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), applies to employment discrimination cases under Title VII, the ADA and the ADEA. *Shaner v. Synthes (USA)*, 204 F.3d 494 (2000); *Matczak v. Frankford Candy & Chocolate Co.*, 136 F.3d 933 (3d Cir. 1997); *Olson v. GE Astrospace*, 101 F.3d 947, 952 (3d Cir. 1996); *Newman v. GHS Osteopathic, Inc.*, 60 F.3d 153, 156-58 (3d Cir. 1995).

> The plaintiff must first establish a prima facie case of discrimination. If the plaintiff meets this initial burden, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *McDonnell Douglas*, 411 U.S. at 802. Finally, should the defendant carry this burden, the plaintiff then must have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. While the burden of production may shift, the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.

Shaner, 204 F.3d at *500 (citing *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. at 252-53).

An essential element of the *prima facie* case in all of Kohn's discrimination claims is that "he was qualified for the Manager of Pricing and Business Analysis position with WPC and was performing at a level which met the legitimate expectations of WPC." Dist. Ct. Letter Op. at 36. The District Court concluded, as to each of Kohn's claims, that he did not meet his burden of establishing a *prima facie* case of discrimination.[4] Dist. Ct. Letter Op. at 40. The District Court found, and we agree, that "Kohn fails to proffer any credible evidence indicating his performance was at a level which met the legitimate expectations of WPC or AT&T." Dist. Ct. Letter Op. at 46; *see also* Dist. Ct. Letter Op. at 47-48, 54 & 67.

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4. With respect to Kohn's ADA claim, the District Court concluded that "[v]iewing the facts in a light most favorable to Kohn, it nevertheless appears that Kohn does not suffer from a 'disability' within the meaning of the statute." Dist. Ct. Letter Op. at 64. The District Court did not need to decide the question of whether ADD is a disability under the statute, one this Circuit has not yet determined, because while Kohn may have presented evidence that his ADD constituted a mental impairment, that is not dispositive of whether ADD is a disability under the ADA. To fall into the protected class, Kohn must also be substantially limited in a major life activity. 42 U.S.C. § 12101(2). We agree with the District Court that "Kohn has not adduced facts indicating he was substantially limited in performing a major life activity, namely, his job duties and responsibilities." Dist. Ct. Letter Op. at 64. Thus, Kohn fails to make out a *prima facie* case in his ADA claim on this element as well.

With respect to his performance, Kohn asserts that there is direct conflict between his certifications and the evidence presented by Appellees. In particular, Kohn argues that he contested the proposition that he failed to meet the requirements of the PIP, although the District Court opinion states the contrary. However. Kohn's burden on summary judgment is not merely to allege a conflict over the quality of his performance, for such a disagreement naturally exists in a dispute of this type. Rather, he must come forward with sufficient evidence to demonstrate that there is a factual controversy as to that element. *See Anderson*, 477 U.S. at 252. We note that mere reliance on conclusory arguments will not establish a genuine issue of material fact. *See Maguire v. Hughes Aircraft Corp.*, 912 F.2d 67, 72 (3d Cir. 1990); *Schoch v. First Fidelity Bancorp.*, 912 F.2d 654, 657 (3d Cir. 1990); *Cigarrera La Moderna v. Inventory Mgmt. Consultant Group, Ltd.*, No. 95-1788, 1998 WL 419460, at *3 (D.N.J. 20 July 1998).

Nevertheless, the District Court continued under the *McDonnell Douglas* framework, assuming *arguendo* that Kohn had made out his *prima facie* case, and found that the Appellees "articulated legitimate, nondiscriminatory reasons for terminating Kohn, namely, his repeated failures to remedy the deficiencies in his work performance and, ultimately, his failure to meet the terms of the PIP." Dist. Ct. Letter Op. at 48. We agree with the District Court on this point as well (though we reiterate that summary judgment in favor of the Appellees was proper after Kohn failed to state a *prima facie* case, an essential element upon which he bears the burden of proof at trial).

The burden thus shifted to Kohn to "prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *McDonnell Douglas*, 411 U.S. at 802. This Court has set out the plaintiff's burden at summary judgment under the third prong of *McDonnell Douglas*: a plaintiff may defeat a motion for summary judgment by submitting "evidence which: (1) casts sufficient doubt upon each of the legitimate reasons proffered by the defendant so that a factfinder could reasonably conclude that each reason was a fabrication; or (2) allows the factfinder to infer that discrimination was more likely than not a motivating or determinative cause of the adverse employment action." *Fuentes v. Perskie*, 32 F.3d 759, 762 (3d Cir. 1994); *Sheridan v. E.I. DuPont de Nemours and Co.*, 100 F.3d 1061, 1066-67 (3d Cir. 1996) (en banc). We further addressed what quantum of evidence is required.

> To discredit the employer's proffered reason, however, the plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent. *See Ezold v. Wolf Block Schorr & Solis-Cohen*, 983 F.2d 509, 531, 533 (3d Cir. 1993); *Villanueva v. Wellesley College*, 930 F.2d 124, 131 (1st Cir.), *cert. denied*, 502 U.S. 861 (1991). Rather, the non-moving plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for

> its action that a reasonable factfinder could rationally find them "unworthy of credence," *Ezold*, 983 F.2d at 531, and hence infer "that the employer did not act for [the asserted] non-discriminatory reasons." *Josey v. John R. Hollingsworth Corp.*, 996 F.2d 632, 638 (3d Cir. 1993) (internal quotation omitted).

Fuentes, 32 F.3d at 765. The District Court concluded that Kohn "has not adduced facts indicating the proffered reasons for his termination were pretextual." Dist. Ct. Letter Op. at 40. As noted, his burden to withstand summary judgment is to "demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them 'unworthy of credence'." *Fuentes*, 32 F.3d at 765. This he has not done. Kohn's conclusory statements that he met the terms of the PIP, or alternatively that his performance was hindered because of illegality concerns, the failure to accommodate his alleged ADD, or his religious observances, do not create an inference of pretext sufficient to overcome the legitimate reason for Kohn's termination proffered by the Appellees.

In sum, after reviewing the record and the District Court Letter Opinion, we hereby affirm the order granting summary judgment in favor of the Appellees for the reasons set forth in the well-analyzed and reasoned opinion of the District Court. Given that the District Court in its discretion declined to exercise supplemental jurisdiction over Kohn's state law claims in accordance with 28 U.S.C. § 1367 and dismissed them without prejudice, *see also Tulley v. Mott Supermarkets,*

Inc., 540 F.2d 187, 195-96 (3d Cir. 1976) ("where a party's federal claims are disposed on summary judgment, the court should generally refrain from exercising supplemental jurisdiction over the remaining state claims), this affirmance does not reach the merits of those claims.

IV.

Kohn also petitions for a writ of mandamus from this Court to direct the District Court Judge to remand his state claims to New Jersey Superior Court. The extraordinary remedy of a writ of mandamus has been invoked only "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when its duty is to do so." *Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 26 (1943). "[I]t is clear that only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy." *Will v. United States*, 389 U.S. 90, 95 (1967). As no such exceptional circumstances exist here, we deny Kohn's petition.

This Court will only issue a mandamus writ where the petitioner (1) has no other adequate means to attain the desired relief, and (2) has shown a clear and indisputable right to the relief sought. *De Masi v. Weiss*, 669 F.2d 114, 117 (3d Cir. 1982) (citing *Kerr v. U.S. Dist. Ct., N.D. Cal.*, 426 U.S. 394, 403 (1976)). "Once these conditions are satisfied, the Court has stated that the matter is largely one within the discretion of the issuing court." *DeMasi*, 669 F.2d at 117 (citing *Kerr*, 426 U.S. at 403; and *Schlagenhauf v. Holder*, 379 U.S. 104, 112 n.8 (1964)).

Kohn asserts that 228 U.S.C. § 1447 requires the District Court to remand the case to the state court from which it was removed. However, only Kohn's federal claims were removed to the District Court. Only after removal did Kohn add his state claims via an amended complaint to the District Court. Appellees argue that the District Court could not remand the state law claims because they were never removed from state court. Because it is generally improper for a federal district court to remand to state court an action that was not originally filed in state court, *Jones v. City of Carlisle, Ky.*, 3 F.3d 945, 951 (6th Cir.), *cert. denied*, 510 U.S. 1177 (1994), it is arguable whether Kohn even has a right to seek the extraordinary mandamus relief sought.

Alternatively, if Kohn has a right to the relief he seeks, the second condition required for the issuance of the writ of mandamus is absent. Because the District Court dismissed Kohn's state law claims without prejudice, Kohn's concern that "the dismissal by the Court below will leave plaintiff without a vehicle to test his dismissal for whistleblowing actions under New Jersey law" is unfounded. The District Court was within its discretion to decline to exercise supplemental jurisdiction pursuant to 28 U.S.C. § 1367(c)(3).

For the foregoing reasons, Kohn's petition for a writ of mandamus is denied.

Appendix A

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 99-5597

SAMUEL KOHN,

Appellant

v.

AT&T CORP., WORLDPARTNERS COMPANY, THE;
KAMIE ZARACKI

NO. 99-5854

IN RE:

SAMUEL KOHN,

Petitioner

On Petition for a Writ of Mandamus to and
On Appeal From the United States District Court
For the District of New Jersey
(D.C. Civil Action No. 97-cv-00102)
District Judge: Honorable Alfred J. Lechner, Jr.

Submitted Under Third Circuit LAR 34.1(a)
December 11, 2000

Before: SCIRICA, AMBRO, *Circuit Judges*,
AND POLLAK, *District Judge*

Appendix A

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was submitted on December 11, 2000.

On consideration whereof, it is now ORDERED AND ADJUDGED by this Court that the Order of the District Court of July 30, 1999 be, and the same is, hereby affirmed and the petition for writ of mandamus is hereby denied. All of the above in accordance with the opinion of this Court. Costs taxed against appellant-petitioner.

ATTEST:

s/ Marcia M. Waldron
Clerk

DATED: March 14, 2001

APPENDIX B — LETTER-OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED JUNE 21, 1999 - AND FILED JUNE 22, 1999

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS OF
ALFRED J. LECHNER, JR.
JUDGE

MARTIN LUTHER KING JR.
FEDERAL BUILDING & U.S. COURTHOUSE
50 WALNUT ST., ROOM 5054
P.O. BOX 999
NEWARK, NJ 07101-0999

21 June 1999

NOT FOR PUBLICATION

LETTER-OPINION
ORIGINAL FILED WITH THE CLERK OF THE COURT

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Appendix B

Re: *SAMUEL KOHN v. AT&T CORP., THE WORLDPARTNERS COMPANY, BRUCE LEASURE and KAMIE ZARACKI*
Civil Action No. 99-102 (AJL)

Counsel:

This is an action by plaintiff Samuel Kohn ("Kohn") against New Jersey defendants AT&T Corp. ("AT&T"), The WorldPartners Company ("WPC"), Bruce Leasure ("Leasure") and Kamie Zaracki ("Zaracki") (collectively, the "Defendants"). In an amended complaint (the "Amended Complaint"), filed on 21 January 1999, Kohn alleges violations of Title VII of the Civil Rights Act ("Title VII"), as amended, 42 U.S.C. § 2000e-1, *et seq.*, the Age Discrimination in Employment Act (the "ADEA"), 29 U.S.C. § 621, *et seq.*, the Americans with Disabilities Act (the "ADA"), 42 U.S.C. § 12101, *et seq.* and State law claims for violations of the Conscientious Employee Protection Act ("CEPA"), N.J.S.A. 34:19-1, and defamation.

Presently pending is a motion by the Defendants for summary judgment (the "Summary Judgment Motion") pursuant to Fed. R. Civ. P. 56 ("Rule 56").[1] For the reasons

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1. In support of the Summary Judgment Motion, the Defendants submitted: a Local Civil Rule 56.1 Statement (the "Defendants' Rule 56.1 Statement"); Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment (the "Moving Brief"), attaching Exhibit A; Affidavit of David J. Reilly, Esq. (the "Reilly Aff."), attaching Exhibits A and B; Affidavit of Kamie Zaracki (the "Zaracki Aff."), attaching Exhibits A through J; and Defendants' (Cont'd)

Appendix B

(Cont'd)
Reply Memorandum of Law in Further Support of Their Motion for Summary Judgment (the "Reply Brief").

In opposition to the Summary Judgment Motion, Kohn submitted: Plaintiff's Response and Statement Under Rule 56.1 (the "Original Kohn Rule 56.1 Statement"); Plaintiff's Response and Statement Under Rule 56.1 (Amended) (the "Amended Kohn Rule 56.1 Statement"); Plaintiff's Memorandum of Law in Opposition to Motion for Summary Judgment (the "Opposition Brief"); Certification of Samuel Kohn (the "Kohn Certif."); Certification of Allan R. Freedman, Esq. (the "Freedman Certif.") and the deposition transcript of Samuel Kohn, dated 15 March 1999, (the "Kohn Dep.").

Kohn and his attorney, Allan R. Freedman, Esq. ("Freedman") did not submit affidavits in opposition to the Summary Judgment Motion. They instead submitted certifications which failed to state or acknowledge the data contained therein were submitted under the penalty of perjury. To survive a properly supported motion for summary judgment, the nonmovant must "proffer evidence significantly probative of the validity of his [or her] claims." *Padillas v. Stork-Gamco, Inc.*, No. 95-7090, 1997 WL 597655, at *3 (E.D.Pa. 19 Sept. 1997) (citing *Anderson*, 477 U.S. at 248-49)); *see Coolspring Stone Supply, Inc. v. Am. States Life Ins.*, 10 F.3d 144, 147 (3d Cir. 1993); *Continental Ins. Co. v. Bodie*, 682 F.2d 436, 439 (3d Cir. 1982); *Jamison v. Miracle Mile Rambler, Inc.*, 536 F.2d 560, 564 (3d Cir. 1976). Unsworn declarations not filed under penalty of perjury fail to satisfy the requirements of Rule 56. *See Small v. Lehman*, 98 F.3d 762, 765 n.5 (3d Cir. 1996) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158 n.17 (1970)); *Pastore v. Bell Telephone Co. of Pennsylvania*, 24 F.3d 508, 511 (3d Cir. 1994); *Radich v. Goode*, 886 F.2d 1391, 1394 (3d Cir. 1989); *United States v. Branella*, 972 F.Supp. 294, 300 (D.N.J. 1997); *Maietta v. United Parcel Service, Inc.*, 749 F.Supp. 1344, 1362 (D.N.J.), *aff'd*, 932 F.2d 960 (3d Cir. 1991); *Fucci v. Graduate Hospital*,
(Cont'd)

which follow, the Summary Judgment Motion is granted. The remaining State law claims are dismissed without prejudice.

Background

A. *Facts*

1. *Parties*

Kohn, a fifty-two year old Jewish male, was hired by AT&T on or about 1 February 1997. *See* Amended Complaint at ¶¶ 3, 5 and 6; Defendants' Rule 56.1 Statement at ¶ 1; Kohn Dep. at 46:24-47:4.[2] In or about March 1996, Kohn accepted an assignment with WPC, an affiliate of AT&T. Amended Complaint at ¶ 7; Defendants' Rule 56.1 Statement at ¶ 2. Kohn assumed the position of Manager of Pricing and Business Analysis with WPC, *id.* at ¶ 3, while remaining

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(Cont'd)
969 F.Supp. 310, 315 n.8 (E.D.Pa. 1997); *Brist v. County of Delaware*, No. 94-1426, 1996 WL 75889, at *4 n.9 (E.D.Pa.), *aff'd*, 101 F.3d 689 (3d Cir. 1996); *Soil Remediation of Philadelphia v. Eclipse Combustion*, No. 95-591, 1995 WL 590176, at *2-3 (E.D.Pa. 5 Oct. 1995).

The Kohn Certification and Freedman Certification are accepted under Fed. R. Civ. P. 11 ("Rule 11") and Fed. R. Civ. P. 56(g) ("Rule 56(g)").

2. As noted, Kohn submitted the complete transcript of the Kohn Deposition taken on 15 March 1999. Relevant portions of the same deposition transcript also are attached as Exhibit A to the Reilly Affidavit.

an employee of AT&T. Amended Complaint at ¶ 8; Defendants' Rule 56.1 Statement at ¶ 2.

As Manager of Pricing and Business Analysis, Kohn was responsible for, among other things, negotiating an Integrated Global Discount ("IGD") among various telephone companies, Amended Complaint at ¶ 22, and compiling and maintaining a price book which analyzed prices charged by telephone companies. *Id.* at ¶ 29.

Kohn reported directly to Zaracki, then Director of Marketing and Acting Vice President of Marketing for WPC. Defendants' Rule 56.1 Statement at ¶ 3. When Leasure became Vice President of Marketing in or about September 1996, Zaracki began reporting to Leasure, who in turn reported to Simon Krieger ("Krieger"), President of WPC. *Id.*; *see also* Zaracki Aff. at ¶ 2.

2. *Performance Reviews of Kohn*

According to Zaracki, during the second half of 1996, she began receiving complaints concerning the work performance of Kohn. Zaracki Aff. at ¶ 3. Specifically, in August 1996, Zaracki states she was apprised of two incidents where Kohn engaged in sexually harassing behavior towards two female employees. *Id.* Kohn, however, denies having engaged in any sexually harassment. *See* Amended Kohn Rule 56.1 Statement at ¶¶ 4, 20. Zaracki nevertheless states she investigated these incidents and counseled Kohn concerning his inappropriate behavior. Zaracki Aff. at ¶ 3.[3]

3. A copy of notes prepared by Zaracki describing "a sexual harassment situation" involving Kohn are attached to the Zaracki Affidavit as Exhibit A.

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In or about August 1996, Zaracki states she again met with Kohn (the "August 1996 Meeting") to discuss a "Career Plan Summary" of the performance expectations and future goals of Kohn. *Id.* at ¶ 4.[4] The Career Plan Summary states, in relevant part:

> [Kohn] desires to further his advancement within AT&T and to obtain an overseas assignment. To indicate his readiness for such advancement, [Kohn] must demonstrate:
>
> - Subject matter expertise in the area of international pricing and the relevant WPC/ WPA processes and policies associated with influencing of pricing strategy WorldSource℠ Services across the Association.
>
> - Successful leadership of a broad range of Partnership, WPC and Member teams in the achievement of mutual goals/objectives for WorldSource℠ Services.
>
> [Kohn] has only just joined WPC as the Pricing and Business Analysis Manager. He should continue in this position for at least 2 more years. This position will give [Kohn] the opportunities to demonstrate his readiness for advancement or placement in an overseas assignment. To facilitate this personal development, [Kohn] should concentrate his efforts in the following areas:

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4. A copy of the Career Plan Summary, dated 19 August 1996, is attached to the Zaracki Affidavit as Exhibit B.

Appendix B

1. Improving his interpersonal skills and cultural awareness by demonstrating effective relationship management with peers, customers and suppliers — recognizing cultural differences and modifying his management approach to their needs.

2. Improving his ability to plan and organizing work activities. [Kohn] must focus on 'making it easy' for others to support his projects, complete activities necessary for WPC success, etc.

3. Demonstrate his willingness and ability to help others succeed while ensuring that his business objectives are also being met. This will require [Kohn] to successful [sic] multi-task while producing quality work on time.

Career Plan Summary. Zaracki states that during the August 1996 Meeting, she advised Kohn he needed to improve upon his interpersonal skills, cultural awareness and ability to plan and organize work activities. Zaracki Aff. at ¶ 4.

Following the August 1996 Meeting, Zaracki states she "continued to receive complaints about Kohn's work performance and his interactions with other employees." *Id.* at ¶ 5. Zaracki also states she personally observed "deficiencies in Kohn's performance, including the fact that he was missing commitments and was having difficulty managing his projects." *Id.* As a result, Zaracki states she held a "coaching/feedback session" with Kohn in October

1996 (the "October 1996 Feedback Session") to help Kohn improve his performance. *Id.* She describes the session as follows:

> During this session, I advised Kohn that his work performance was declining and that his peers and clients were complaining about his behavior and lack of respect, and that if he did not improve, he would be in danger of receiving a 'Partially Met' appraisal rating for the year. I also provided Kohn with a Coaching/Feedback [D]ocument[5] which described his career objectives and detailed the skills needed for him to succeed.

Id.

During the October 1996 Feedback Session, Zaracki states she also provided Kohn with a written Development Plan detailing her expectations for him for the remainder of 1996. *See id.* at ¶ 6.[6]

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5. A copy of the Coaching/Feedback Document is attached to the Zaracki Affidavit as Exhibit C. The Coaching/Feedback document listed the "attributes that signal readiness" for an oversees assignment or a promotion to district manager and the "skills required for success" in these positions. *See* Coaching/Feedback Document.

6. A copy of the Development Plan is attached to the Zaracki Affidavit as Exhibit D. The Development Plan provides:

1. Contact EAP

— Carol Caudill (908) 234-3383

(Cont'd)

Appendix B

(Cont'd)

2. Complete all documentation required to support IGD Trial by 11/22.

- Trial processes, documentation, job aids
- Member communications material
- Review with supervisor prior to distribution — incorporate any required changes

3. Complete distribution of relevant IGD communications material to Members by 11/27. Conduct teleconference with Members participating in the trial by 12/6.

4. Complete development and delivery of price book update process by 11/22.

- Process flow and associated documentation
- Executed once for PL
- Distribute updated PL price book to Member/ WPC PL Product Managers
- Distribute FR price book to Member/WPC FR Product Managers
- Review with supervisor prior to distribution — incorporate any required changes

5. Develop draft of WorldSource Pricing Strategy Document by 12/20.

(Cont'd)

Appendix B

Also during the October 1996 Feedback Session, Zaracki states she "discussed with, and provided to, Kohn, numerous examples of his inappropriate behaviors and performance deficiencies." *Id.* She additionally states she prepared and provided to Kohn a document entitled "Illustrative Examples — S. Kohn Development Opportunities" (the "Illustrative Examples Document") which detailed examples of his

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(Cont'd)

- WPC document format required
- Review with supervisor — incorporate any required changes

6. Continue to manage and support GPP

- Meeting scheduled, minutes prepared and distributed

7. Schedule 2-one hour status meetings per week with supervisor

- One each at the beginning and end of the week
- Be prepared to provide written action plan on what will be accomplished that week during the beginning-of-week meeting and status of what was accomplished during the end-of-week meeting
- Content related meetings are to be scheduled in addition to status meetings as needed

Development Plan.

inappropriate behavior.[7] Zaracki then recommended Kohn contact the Employee Assistance Program. Zaracki Aff. at ¶ 6.

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7. A copy of the Illustrative Examples Document is attached to the Zaracki Affidavit as Exhibit E. It provides:

Argumentative Posture:

- Need for price book update process, legal issues
- Whether or not AT&T IGD meeting was "successful"
- How to proceed with all day meeting (10/9)
- Whether or not the IGD project is behind schedule
- Whether or not [Kohn] demonstrates use of IGD project plan

Inappropriate Comments:

- "I'll kill you" to Long Lam
- Phone episode with Lukas' friend
- "Because I wanted to piss you off" to Irwin Fouwels
- "Cliff I want you now"
- "I'm not happy" to [Zaracki]

(Cont'd)

Appendix B

(Cont'd)

- "Well if you don't care about the quality . . ." To [Zaracki]

- "Don't you know what you are doing" to Cliff Ting

Inability to Control Temper and Displays of Immature Behavior:

- Shouting at Cliff to help you

- Acting impatient with supervisor in open office area

- Clowning in the office

- Carrying argument in loud whiney voice with supervisor into open office area

- Being very controlling of peer's [sic] time

- Chastising supervisor for not acknowledging FR price book activity

Lack of Courtesy and Professional Demeanor:

- Letters to CHT-I and others on FR price questions

Not Always Respectful of Others:

- Yelling at people: Cliff, Kurt, [Zaracki]

(Cont'd)

Appendix B

According to Zaracki, Kohn "did not satisfactorily complete the Development Plan[.]" *Id.*[8]

(Cont'd)

- Expecting others to deal with you and your needs "on demand"

- Expressing extreme displeasure when people are either unwilling or unable to do so (i.e. Cliff, Kurt: help w/ PC; [Zaracki]: FR price book, prior to meeting w/ FI & my requirement to leave promptly at 5pm)

Recognizing Supervisor's Role, Responsibility:

- Business requirement for price book distribution, update process, timeframe

- Role in representing WPC posiiton [sic] at AT&T IGD meeting

Illustrative Examples Document.

8. The progress of Kohn was summarized in a document prepared by Zaracki entitled, "Status of S. Kohn's Performance on Development Plan," (the "Status of Performance Document") a copy of which is attached to the Zaracki Affidavit as Exhibit F. The Status of Performance Document, dated 18 February 1997, states:

1. [Kohn] did contact EAP.

2. [Kohn] did not complete IGD Trial documentation by 11/22. Progress was so slow and IGD Team members were becoming so frustrated with the lack of effective

(Cont'd)

Appendix B

Kohn, by contrast, denied:

> that Ms. Zaracki 'continued to receive complaints' about [his] performance and interactions 'throughout the second half of 1996.' There was only one instance during that period when this was brought to [his] attention, . . . [by way of the Illustrative Examples Document]. When [Kohn] followed up with the individuals identified [in the document], [he] discovered that they denied complaining or reporting the incidents reflected

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(Cont'd)

> project management displayed by Sam that I (Kami Zaracki) took over the project manager role for the IGD and removed [Kohn] from the project.
>
> 3. [Kohn] did not complete these activities because he was removed from the project.
>
> 4. [Kohn] did not complete these activities by 11/22. They were completed week of 2/16/96.
>
> 5. [Kohn's] outline of the Strategic pricing document was not acceptable. He did not incorporate my comments by 12/20, nor did he revise the outline as requested.
>
> 6. It was not necessary to hold a GPP meeting.
>
> 7. [Kohn] did schedule regular meetings with his supervisor.

Status of Performance Document.

> in the document. [He] conclude[d] that this document is simply further evidence of Ms. Zaracki's attacks on [him].

Kohn Certif. at ¶ 28. He further states:

> Ms. Zaracki's characterizations of the [October 1996 Feedback Session] is [sic] also false. She did not advise me at that time that my work performance was declining and that peers and clients were complaining .... The coaching/ feedback session was addressed simply to my getting a promotion and an overseas assignment, developments which reflected the opposite of declining performance and increasing complaints. I deny Ms. Zaracki's statements that I was missing commitments and having difficulty managing my projects.

Id. at ¶ 29.

Kohn asserts the "difficulties arose because of Ms. Zaracki's disregard for the legal problems raised by her instructions to me." *Id.* Specifically, Kohn states he "objected to carrying out [Zaracki's] instructions with respect to distributing certain price books because of antitrust reasons discussed with legal counsel for AT&T." *Id.* at ¶ 4; *see also* Amended Complaint at ¶¶ 30-31 (alleging that communications among telephone companies concerning pricing and publication of prices the companies agreed to charge violates

antitrust laws).[9] He likewise alleges he failed to complete the IGD process development and trial documentation because "communications among different telephone companies concerning that 'integrated global discount' may reasonably be thought to constitute a violation of the antitrust laws." Amended Complaint at ¶ 23; *see also id.* at ¶¶ 25-27; Kohn Certif. at ¶¶ 4, 5.

Kohn further asserts he "successfully completed in all material respects the [Development] Plan, insofar as it could be completed, without giving effect to illegal actions." Kohn Certif. at ¶ 8. Kohn opines his sensitivity to these alleged legal problems "prevented AT&T and the members of [WPC] from the legal liability that would have followed" had he completed his assigned tasks. *Id.* at ¶ 5.

It appears from a memorandum sent by Zaracki to Kohn, dated 29 October 1996, (the 29 October 1996 Memorandum) that Kohn was informed there were no legal impediments to completing his assignments. *See* 29 October 1996 Memorandum.[10] Kohn was directed to complete his projects, which had been "clearly identified" in his objectives since the preceding April, notwithstanding his reservations. *See id.*

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9. The Amended Complaint, like the Kohn Certification and Freedman Certification, is unsworn. As such, it is cited or quoted only for context. As discussed below, the unsworn Amended Complaint does not create any genuine issues of material fact. *See* Fed. R. Civ. P. 56(c) ("Rule 56(c)").

10. A copy of the 29 October 1996 Memorandum is attached to the Kohn Certification as Exhibit 4.

3. *Alleged Disability*

Kohn additionally states he informed Zaracki during the August 1996 Meeting that he suffered from attention deficit disorder ("ADD"). *See* Kohn Dep. at 281:5-23; Kohn Certif. at ¶ 27; Amended Complaint at ¶ 5. According to Kohn, during that meeting he "asked [Zaracki] to speak with [his] physician to get details on the required accomodations [sic]; she declined. Only several months later did she refer it to [the Health Affairs division of AT&T ("Health Affairs")], and it was not until late February [of 1997], some six months after it was first brought to her attention, that a 'report' was issued by Dr. [Joseph] Cillo [("Dr. Cillo")]." Kohn Certif. at ¶ 27. The Defendants, however, assert: "Kohn never specified any accommodations he needed to ensure that he could complete the projects that he was assigned as part of his job responsibilities." Defendants' Rule 56.1 Statement at ¶ 8.

It appears that on or about 25 November 1996, Zaracki forwarded a "Request for Employee Fitness Evaluation" to Health Affairs to have Kohn evaluated for his alleged ADD. *See* Zaracki Aff. at ¶ 7.[11] In or about February 1997, Zaracki received a written evaluation from Dr. Cillo (the "Cillo Evaluation"). *See id.*; *see also* Kohn Certif. at ¶ 27. The Cillo Evaluation, dated 21 February 1997, provided:

> [Kohn] has a medical condition which if optimally managed should not interfere with his ability to

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11. A copy of the Request for Employee Fitness Evaluation, dated 25 November 1996, is attached to the Zaracki Affidavit as Exhibit G.

> perform his job. Recommendations for the workplace include the following: He needs a clear statement about productivity and the outcome expected in a clear set of objectives and milestones. This would certainly involve a formal performance improvement plan with well-understood time-bound goals.
>
> It is hoped that distractions and side issues will not be a problem if the expectation is clear that he focus on what is important to accomplish his job. He must be urged not to dwell on his perceptions of supervisors' feelings or 'office politics,' but focus on the job at hand.

Cillo Evaluation.[12] Zaracki states she discussed the content of the evaluation with Dr. Cillo. Zaracki Aff. at ¶ 7.

Kohn asserts Zaracki failed to follow the instructions provided by Cillo, and instead "utilized [Kohn's] disability to undercut [his] ability to perform." Kohn Certif. at ¶ 18; *see also* Amended Complaint at ¶¶ 45. In this regard, Kohn states Zaracki refused to hold weekly meetings and failed to provide him with "meaningful feedback" or certain documents needed to complete assignments. Kohn Certif. at ¶ 18; Amended Complaint at ¶ 53. Kohn alleges:

> Rather than accomodating [sic] [Kohn's] disability, Ms. Zaracki used that disability to

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12. A copy of the Cillo Evaluation is attached to the Zaracki Affidavit as Exhibit G.

> create hostility and division in the workplace against [Kohn] and create barriers and obstacles to the successful completion of his objectives, in violation of the [ADA].

Amended Complaint at ¶ 49.

4. *Events Culminating in Termination of Kohn*

On or about 24 February 1997, Zaracki again met with Kohn to discuss his deficient performance. *See* Amended Complaint at ¶ 61. Zaracki states that during the meeting, she provided Kohn with a Performance Appraisal for the period spanning from 15 March 1996 through 31 December 1996. Zaracki Aff. at ¶ 8; *see also* Performance Appraisal.[13] The Performance Appraisal observed, *inter alia*:

> [Kohn] successfully developed the WPC proposal for global discounts (IGD) and reviewed it with Members and Partners to gain their input and support. His document on the IGD concept is well constructed and easy to understand.
>
> However, and more importantly, [Kohn] did not effectively manage the IGD concept into a workable plan. As project manager, [Kohn] was responsible for managing the IGD into market trial by 12/96. This required obtaining Member commitment to participate in the trial as well as completion of the Trial Reference Guide

13. A copy of the Performance Appraisal is attached to the Zaracki Affidavit as Exhibit H.

documentation, a turn key document which explains the IGD concept, processes, roles/ responsibilities and Member job aids associated with IGD. [Kohn] successfully obtained commitment from six Members to participate in the trial. He did not complete the IGD process development and trial documentation in the time frame required. Progress was so slow that the trial start date, which was the WPC President's commitment to the Partners, was in jeopardy. IGD team members repeatedly complained about [Kohn's] lack of effective project management. As a result, [Kohn] was removed from the project.

[Kohn] did prepare a draft outline of the pricing strategy document. However, it did not have sufficient detail to be meaningful. [Kohn] was notified by his supervisor that the outline was unsatisfactory. No revisions were submitted for review to his supervisor.

. . .

While [Kohn] completed [a WS-PL price book and work updating subsequent price books], the work was not completed in a timely manner. Delays in updating the price books prevented Members from quickly pricing initial customer bid requests. The outdated price books generated more work for the Members in pricing bids, thus adding to the bid cycle time and a [sic] creating a source of Member and customer dissatisfaction.

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> [Kohn] prepared the Offer Management department budget. He did an adequate job, but required assistance from his supervisor to identify errors. In addition, his supervisor determined that [Kohn] was having difficulty effectively managing the IGD Offer Development and price book update projects. This combined with mediocre support of the budgeting process led his supervisor to conclude that [Kohn] would not be effective in leading the revenue forecast project. This critical job responsibility was assigned to another individual. [Kohn's] overall contribution to WPC in the area of business plan support was unsatisfactory.

Performance Appraisal at 1-2.

As a result of the findings in the Performance Appraisal, Kohn received a "Partially Met" performance rating. Zaracki Aff. at ¶ 8. Kohn then was presented with an Election Form, dated 24 February 1997, which gave him option of either (1) being placed on a Performance Improvement Plan (the "PIP"), which provided for the termination of his employment if he failed to improve his employment within sixty days, or (2) being permitted to search for another position full-time for sixty days, after which his employment would be terminated if he did not find another position. *See* Zaracki Aff. at ¶ 9; Election Form.[14] The Election Form further stated: "If employee declines to sign or choose an Option, he/she will be placed on a PIP immediately." Election

14. A copy of the Election Form is attached to the Zaracki Affidavit as Exhibit I.

Form. Because Kohn did not sign the Election Form, he was, by default, placed on the sixty day PIP. *See* Zaracki Aff. at ¶ 9; Amended Complaint at ¶ 37; Kohn Certif. at ¶ 23.

A document entitled "Performance Improvement Plan" (the "PIP Document") was then provided to Kohn. The PIP Document delineated the "skills required for success," "opportunities to demonstrate skills" and various "development benchmarks" to be employed by Kohn in improving both his management and interpersonal skills. *See* PIP Document.[15] The PIP Document also listed the managerial responsibilities of Kohn:

> [Kohn] shall be responsible for carrying out all phases of the pricing and business analysis projects assigned to him. This includes but is not limited to:
>
> - Ongoing Member deployment and certification support
> - FR and PL Price Book updates and distribution to the required individuals
> - Development of pricing strategy document, updates and revisions based on supervisor(s) input
> - Conducting price analysis with recommendations on WorldSource PL

15. A copy of the PIP Document is attached to the Zaracki Affidavit as Exhibit J.

- Ongoing participation in win/loss review process

- Develop price structures and supporting documentation for WorldSource Toll Free Service (Freephone).

Id.

Kohn asserts the objectives set forth in the PIP

> were not clearly defined and there were no objectively measurable performance criteria . . . Because such 'objectives' were antithetical to the instructions by AT&T's Dr. Cillo, the application of PIP itself constituted a violation of the American with Disabilities Act, for Ms. Zaracki was taking advantage of [his] disability to assist in [his] being fired.

Kohn Certif. at ¶ 24; *see also* Amended Complaint at ¶ 62.

Zaracki states Kohn did not successfully complete the terms of the PIP. Zaracki Aff. at ¶ 11. Zaracki memorialized her findings in a "PIP Results" document, dated 6 May 1997, (the "PIP Results Document") which reflected her assessment of the performance of Kohn as measured against the conditions and objectives set forth in the PIP document. The PIP Results Document stated, *inter alia*, Kohn failed to complete the "Pricing Strategy Document" or conduct "PL Competitive Price Analysis[.]" *See* PIP Results

Document.[16] It further observed Kohn "[d]id not take full responsibility for all decisions (i.e. price book)," "constantly attempted to get others to complete his activities (i.e. price book, price strategy document)," and "[d]id not complete activities on time[.]" *Id.*

Kohn does not contest that he failed to meet the requirements of the PIP. *See* Amended Complaint at ¶ 64. He simply states Zaracki had extended the deadlines of various assignments and told him to ignore certain projects. *See* Kohn Certif. at ¶¶ 31-33.[17] Kohn attributes other failures to vaguely referenced "legal and regulatory problems." *Id.* at ¶ 31; Amended Complaint at ¶¶ 64-66.

Zaracki subsequently recommended Kohn be terminated from his position with WPC, in light of his failure to successfully complete the PIP. Zaracki Aff. at ¶ 11. According to Zaracki, both Leasure and Krieger concurred in and approved her recommendation. *Id.*

On 8 May 1997, Kohn was terminated from his position with WPC. *See* Zaracki Aff. at ¶ 12. By letter, dated 8 May 1997, (the "8 May 1997 Termination Letter") Zaracki informed Kohn he had not met the terms of the PIP and had thirty days within which to find another position within

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16. A copy of the PIP Results Document is attached to the Zaracki Affidavit as Exhibit K.

17. Contrary to these assertions, in the Amended Complaint Kohn alleges Zaracki "set unreasonable and unrealistic schedules[.]" Amended Complaint at ¶ 40.

AT&T. *See* 8 May 1997 Termination Letter.[18] Kohn was directed to report immediately to the AT&T Resource Center and to take his personal belongings with him. *Id.*

By letter, dated 30 May 1997, (the "30 May 1997 Extension Letter") Kohn was provided with a thirty-day extension of time within which to utilize the AT&T Resource Center to find another position with AT&T. *See* Zaracki Aff. at ¶ 12; 30 May 1997 Extension Letter.[19] While Kohn searched for another position, Zaracki, Leasure and Krieger agreed to extend him on the AT&T payroll until 20 June 1997. *See* Zaracki Aff. at ¶ 12. It appears, however, Kohn did not obtain another position with AT&T. *See id.* Consequently, Kohn was removed from the AT&T payroll, effective 20 June 1997. *Id.;* Kohn Certif. at ¶ 25.

5. *The Instant Complaint*

Following his termination, Kohn filed a complaint with the Equal Employment Opportunity Commission (the "EEOC"). Kohn Certif. at ¶ 25. Kohn alleges he received a Right-To-Sue letter from the EEOC on or about 1 September 1998. Amended Complaint at ¶ 18.

As mentioned, Kohn filed the Amended Complaint on 21 January 1999. He alleges, *inter alia*, he was illegally terminated and discriminated against "by reason of his age,

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18. A copy of the 8 May 1997 Termination Letter is attached to the Zaracki Affidavit as Exhibit L.

19. A copy of the 30 May 1997 Extension Letter is attached to the Zaracki Affidavit as Exhibit M.

his religion and his disabilities," in violation of Title VII, the ADEA and the ADA. Amended Complaint at ¶¶ 1, 5. The Amended Complaint also alleges Zaracki and Leasure engaged in discriminatory conduct, including:

> [Zaracki's] failure to provide [Kohn] with clear objectives and criteria regarding job expectations and reasonable managerial support and providing contradictory direction to [Kohn], her sabotaging [Kohn's] pricing work by directing co-workers of [Kohn] not to cooperate with him and providing misinformation to [Kohn] and his co-workers, her attempt to isolate [Kohn] from his co-workers, her failure to accomodate [sic] [Kohn's] observance of Jewish holy days and dietary requirements, as well as her failure to follow AT&T-required procedures to address alleged deficiencies in his work, which procedures were necessary by virtue of his disabilities as shown by AT&T's own medical evaluation. Before terminating an employee with perceived unsatisfactory performance behavior, these procedures were required by AT&T in devising and following through on a PIP . . . which was necessarily to be in writing and followed through by discussion and explanation to the affected employee.
>
> The PIP set up by Ms. Zaracki and Mr. Leasure was set up with the intention of forcing [Kohn] to leave AT&T. The PIP was not used as a tool to help the employee but rather was set up

> and used as a means to terminate [Kohn]. The alleged plan consisted of vague and obtuse objectives combined with unclear subjective non-measurable performance criteria.

Id. at ¶¶ 10-11. As stated, Kohn alleges, "these actions were motivated by discrimination against him by reason of his age, his faith and his disability[.]" *Id.* at ¶ 16.

Zaracki, however, asserts:

> The sole reason for Kohn's termination was his poor work performance. Neither Kohn's age, religion, his ADD, nor any legal issues and/or concerns he may have raised during his assignment to WPC, played any part in this decision, or for that matter any other employment action taken with respect to Kohn.

Zaracki Aff. at ¶ 11.

B. *Procedural History*

Kohn initially filed a complaint against the Defendants in the Superior Court of New Jersey, Chancery Division, Bergen County (the "Chancery Division Complaint") on 4 June 1998. *See* Chancery Division Complaint. The Chancery Division Complaint alleged violations of CEPA and defamation. By order, dated 27 January 1999, the Chancery Division Complaint was dismissed without prejudice. *See* Stipulation and Order filed with this Court on 22 March 1999, (the "Stipulation and Order").

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On or about 24 November 1998, Kohn filed another complaint against the Defendants in the Superior Court of New Jersey, Law Division, Bergen County (the "Superior Court Complaint"). The Superior Court Complaint alleged, *inter alia*, the Defendants maintained a pattern and practice of discrimination against Kohn, in violation of Title VII, the ADEA and the ADA. *See* Superior Court Complaint.[20]

On 8 January 1999, the Defendants timely removed the action to this court. *See* Notice of Removal. On 13 January 1999, the Defendants requested an extension of time to answer or otherwise move, which request was granted, by order of the Clerk of the Court, dated 13 January 1999, (the "13 January 1999 Clerk's Order"). *See* 13 January 1999 Clerk's Order.

As mentioned, Kohn filed the Amended Complaint on 21 January 1999. *See* Amended Complaint. The Amended Complaint added claims against the Defendants for defamation and violations of CEPA. *See id.* at Counts Two and Three. Pursuant to the Stipulation and Order, the causes of action for defamation and CEPA violations were deemed to have been commenced as of 4 June 1998, the date of the filing of the Chancery Division Complaint. *See* Stipulation and Order.

The Defendants filed an answer (the "Answer") to the Amended Complaint on 10 March 1999. *See* Answer. The Summary Judgment Motion was filed on 7 May 1999.

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20. The Superior Court Complaint is attached as Exhibit A to the notice of removal (the "Notice of Removal") filed by the Defendants on 8 January 1999.

Appendix B

Discussion

A. *Summary Judgment Standard of Review*

To prevail on a motion for summary judgment, the moving party must establish "there is no genuine issue as to any material fact and that [it] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Williams v. Chrysler Corp.*, 163 F.3d 183, 186 (3d Cir. 1998); *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1366 (3d Cir. 1996); *Witco Corp. v. Beekhuis*, 38 F.3d 682, 686 (3d Cir. 1994). Factual disputes may not be resolved on a motion for summary judgment. *See Linan-Faye Constr. Co. v. Housing Auth.*, 49 F.3d 915, 926-27 (3d Cir. 1995) ("[A]t the summary judgment stage, 'the judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial' ") (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)); *Desvi, Inc. v. Continental Ins. Co.*, 968 F.2d 307, 308 (3d Cir. 1992).

When considering a motion for summary judgment, all evidence submitted must be viewed in a light most favorable to the party opposing the motion. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Seitzinger v. Reading Hosp. & Med. Ctr.*, 165 F.3d 236, 238 (3d Cir. 1999) (citing *Gallo v. City of Philadelphia*, 161 F.3d 217, 219 (3d Cir. 1998)); *Williams*, 163 F.3d at 186; *Healey v. Southwood Psychiatric Hosp.*, 78 F.3d 128, 130-31 (3d Cir. 1996); *General Ceramics Inc. v. Firemen's Fund Ins. Cos.*, 66 F.3d 647, 651 (3d Cir. 1995); *Meyer v. Riegel Prods.*

Corp., 720 F.2d 303, 307 n.2 (3d Cir.) (stating court must resolve "all inferences, doubts and issues of credibility . . . against the moving party"), *cert. dismissed*, 465 U.S. 1091 (1984).

When the resolution of issues depends wholly upon the interpretation of specific statutory language and the applicable law, summary judgment is appropriate. *See DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 724 (3d Cir.), *cert. denied*, 516 U.S. 916 (1995); *see also Gans v. Mundy*, 762 F.2d 338, 341 (3d Cir.) ("[S]ummary judgment is proper where the facts are undisputed . . . ."), *cert. denied*, 474 U.S. 1010 (1985); *Estate of Reddert v. United States*, 925 F.Supp. 261, 265 (D.N.J. 1996).

When the nonmoving party bears the burden of proof at trial, the moving party is entitled to summary judgment by showing "there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325. Once the movant demonstrates an essential element of the nonmovant's case is lacking, the nonmovant must come forward with sufficient evidence to demonstrate there is a factual controversy as to that element. *See Anderson*, 477 U.S. at 247; *Siegel Transfer, Inc. v. Carrier Express, Inc.*, 54 F.3d 1125, 1130-31 (3d Cir. 1995); *Witco*, 38 F.3d at 686. "The mere existence of a scintilla of evidence in support of the [nonmovant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 252; *Matsushita*, 475 U.S. at 586 (nonmovant must "do more than simply show that there is some metaphysical doubt as to the material facts"); *accord Siegel*, 54 F.3d at 1130-31; *Nevets C.M., Inc. v.*

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Nissho Iwai Am. Corp., 726 F.Supp. 525, 534 (D.N.J.), *aff'd without op'n*, 899 F.2d 1218 (3d Cir. 1990).

If the nonmovant fails to make a sufficient showing regarding an essential element of its case upon which it will bear the ultimate burden of proof at trial, all other facts are necessarily immaterial and summary judgment must be granted. *See Celotex*, 477 U.S. at 321; *Siegel*, 54 F.3d at 1130-31; *see also Armstrong v. City of Dallas*, 997 F.2d 62, 67 (5th Cir. 1993) (stating "[s]ummary judgment is appropriate where critical evidence is so weak or tenuous on an essential fact that it could not support a judgment in favor of the nonmovant, or where it is so overwhelming that it mandates judgment in favor of the movant.").

In a discrimination action, a defendant must establish "the plaintiff will be unable to introduce either direct evidence of discrimination or indirect evidence by showing that the proffered reason for the employment action is subject to factual dispute." *Hankins v. Temple University*, 829 F.2d 437, 440 (3d Cir. 1987); *see Weldon v. Kraft*, 896 F.2d 793, 797 (3d Cir. 1990).

Once a motion for summary judgment is made and supported by "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," *see* Fed. R. Civ. P. 56(c),

> an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule,

> must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Fed. R. Civ. P. 56(e) ("Rule 56(e)"). As noted, to survive a properly supported motion for summary judgment, the nonmovant must "proffer evidence significantly probative of the validity of his [or her] claims." *Padillas*, 1997 WL 597655, at *3 (citing *Anderson*, 477 U.S. at 248-49)); *see Coolspring Stone Supply*, 10 F.3d at 147; *Bodie*, 682 F.2d at 439; *Jamison*, 536 F.2d at 564. Unsworn declarations not filed under penalty of perjury fail to significantly legitimize claims. *See Small*, 98 F.3d at 765 n.5 (citing *Adickes*, 398 U.S. at 158 n.17); *Pastore*, 24 F.3d at 511; *Radich*, 886 F.2d at 1394; *Branella*, 972 F.Supp. at 300; *Majetta*, 749 F.Supp. at 1362; *Fucci*, 969 F.Supp. at 315 n.8.

B. *Framework for Discrimination Claims*

As indicated, Kohn alleges the Defendants discriminated against him on the basis of his religion, age and alleged disabilities in violation of Title VII, the ADEA and the ADA.

Employment discrimination claims under Title VII, the ADEA and the ADA may be established either by the presentation of direct evidence of discrimination, *see Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Torre v. Casio, Inc.*, 42 F.3d 825, 829 (3d Cir. 1994), or from evidence which creates an inference of discrimination. *See United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983); *Torre*, 42 F.3d at 829; *Kralman v. Illinois*

Dep't of Veterans' Affairs, 23 F.3d 150, 153 (7th Cir.), *cert. denied*, 513 U.S. 948 (1994); *Harel v. Rutgers, The State University*, 5 F.Supp.2d 246, 263 (D.N.J. 1998). "Direct evidence of discrimination would be evidence which, if believed, would prove the existence of the fact in issue *without inference or presumption.*" *Torre*, 42 F.3d at 829 (emphasis in original; citations and internal punctuation omitted). Evidence is not direct "where the trier of fact must *infer* the discrimination . . . from an employer's remarks." *Id.* (emphasis in original; citation omitted).

Where a plaintiff has not presented direct evidence of discrimination, employment discrimination claims are construed pursuant to the framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) and clarified in *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981). *See Harel*, 5 F.Supp.2d at 263. In *McDonnell Douglas* and *Burdine*, the Supreme Court articulated a four-part framework for evaluating claims of unlawful discrimination under Title VII.[21]

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21. As discussed below, the burden-shifting scheme established by the Supreme Court in *McDonnell Douglas* applies not only to actions brought pursuant to Title VII, *see Fuentes v. Perskie*, 32 F.3d 759, 763 (3d Cir. 1994), but also to claims brought under the ADEA, *see O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996); *Simpson v. Kay Jewelers, Div. of Sterling, Inc.*, 142 F.3d 639, 643 (3d Cir. 1998), and the ADA. *See Walton v. Mental Health Ass'n of Southeastern Pa.*, 168 F.3d 661, 666 (3d Cir. 1999) (quoting *Newman v. GHS Osteopathic, Inc.*, 60 F.3d 153, 157 (3d Cir. 1995)); *Olson v. General Electric Astrospace*, 101 F.3d 947, 951 (3d Cir. 1996) (citing *Newman*, 60 F.3d at 157); *Owen v. Computer Sciences Corp.*, No. 97-6272, 1999 WL 43642, at *3 n.6 (D.N.J. 2 Feb. 1999).

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Under the *McDonnell Douglas/Burdine* framework, a discharged employee must first prove a *prima facie* case of discrimination by a preponderance of the evidence. *Burdine*, 450 U.S. at 252-53 (quoting *McDonnell Douglas*, 411 U.S. at 802). To establish a *prima facie* case of disparate treatment discrimination, Kohn must prove by a preponderance of the evidence (1) he belongs to a protected class, (2) he was qualified for the Manager of Pricing and Business Analysis position with WPC and was performing at a level which met the legitimate expectations of WPC, (3) he was not retained in the position, despite being qualified and (4) he ultimately was replaced by someone not in the protected class, permitting an inference of discrimination. *See Burdine*, 450 U.S. at 252-53; *McDonnell Douglas*, 411 U.S. at 802; *see also Smith v. Borough of Wilkinsburg*, 147 F.3d 272, 278 (3d Cir. 1998); *Simpson*, 142 F.3d at 643-44 & n.5; *Turner v. Schering-Plough Corp.*, 901 F.2d 335, 342 (3d Cir. 1990); *Lawrence v. Nat'l Westminster Bank of N.J.*, 98 F.3d 61, 65-66 (3d Cir. 1996); *Waldron v. SL Industries, Inc.*, 56 F.3d 491, 494 (3d Cir. 1995); *Sempier v. Johnson & Higgins*, 45 F.3d 724, 728 (3d Cir.), *cert. denied*, 515 U.S. 1159 (1995); *Billet v. Cigna Corp.*, 940 F.2d 812, 816 n.3 (3d Cir. 1991) (citing *Maxfield v. Sinclair Int'l*, 766 F.2d 788, 792 (3d Cir.), *cert. denied*, 474 U.S. 1057 (1986)); *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 897 (3d Cir.), *cert. dismissed*, 483 U.S. 1052 (1987).

Once established, a *prima facie* case creates a presumption of discriminatory intent by the defendant-employer. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993); *Burdine*, 450 U.S. at 254. While the ultimate burden of persuasion remains with the plaintiff, *see Smith*,

147 F.3d at 278, the burden of production shifts to the defendant-employer who must articulate a legitimate, nondiscriminatory justification for terminating the employee. *Hicks*, 509 U.S. at 507; *Burdine*, 450 U.S. at 254; *McDonnell Douglas*, 411 U.S. at 802; *Lawrence*, 98 F.3d at 66. "To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection." *Burdine*, 450 U.S. at 255. At this stage, "the defendant bears only the burden of explaining clearly the nondiscriminatory reasons for its actions." *Id.* at 260 (rejecting lower court decision holding defendant to a preponderance of the evidence standard). Once the employer satisfies this burden, the presumption raised by the *prima facie* case is "rebutted" and "drops from the case." *Id.* at 255 & n.10; *see Hicks*, 509 U.S. at 507.

A plaintiff-employee must then prove by a preponderance of the evidence the legitimate reasons proffered by the employer "were not its true reasons, but were a pretext for discrimination." *McDonnell Douglas*, 411 U.S. at 802; *see Hicks*, 509 U.S. at 507-08; *Burdine*, 450 U.S. at 253; *Torre*, 42 F.3d at 829; *Fuentes*, 32 F.3d at 763; *Owen*, 1999 WL 43642, at *3 n.6. Concerning the "pretext" stage of the *McDonnell Douglas/Burdine* analysis, this Circuit has stated:

> To discredit the employer's proffered reason [for discharging an employee], . . . the plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent. Rather, the . . .

> plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them 'unworthy of credence,' and hence infer 'that the employer did not act for [the asserted] non-discriminatory reasons.'

Brewer v. Quaker State Oil Refining Corp., 72 F.3d 326, 331 (3d Cir. 1995) (quoting *Fuentes*, 32 F.3d at 765) (emphasis in original) (internal citations omitted); *see Waldron*, 56 F.3d at 495 (rejecting the "pretext-plus" standard under which a plaintiff would have to show defendant-employer's reasons were false *and* the real reason for the employment action was discriminatory).

To survive summary judgment when an employer has articulated a legitimate, nondiscriminatory reason for its actions,

> the plaintiff must point to evidence, direct or circumstantial, from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action.

Simpson, 142 F.3d at 644 (quoting *Fuentes*, 32 F.3d at 764); *see Lawrence*, 98 F.3d at 66; *Sempier*, 45 F.3d at 731.

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Once the plaintiff points to evidence sufficient to discredit the proffered reasons of the defendant-employer, the plaintiff need not also come forward with additional evidence of discrimination beyond his or her *prima facie* case to overcome a summary judgment motion by the defendant. *Brewer*, 72 F.3d at 331; *Waldron*, 56 F.3d at 495.

In this instance, Kohn has not presented, nor does he allege there is any direct evidence of age, religious or disability discrimination. Accordingly, his claims are analyzed pursuant to the *McDonnell Douglas/Burdine* framework. *See Harel*, 5 F.Supp.2d at 263. As discussed below, Kohn has offered no evidence, or even explanation to show the actions taken by AT&T and WPC[22] were *prima facie* discriminatory. However, assuming, *arguendo*, Kohn has stated a *prima facie* case of discrimination, he has not adduced facts indicating the proffered reasons for his termination were pretextual. Material facts relating to the Title VII, ADEA and ADA claims of Kohn are not in dispute; AT&T and WPC, therefore, are entitled to judgment as a matter of law on those claims. The claims of Kohn against his employer are addressed seriatim.

1. *Title VII*

As stated, Kohn alleges WPC and AT&T discriminated against him in part because he was Jewish. *See* Amended Complaint at ¶ 14. The Amended Complaint does not set forth specific examples of religious discrimination. It alleges only that Kohn is Jewish, *see* Amended Complaint at 5, and

22. The discrimination claims against Zaracki and Leasure in their individual capacities are addressed in Part C, *infra*.

that he was prevented from taking vacation during Christmas time because he already took vacation time during the Jewish Holy Days.[23] *See id.* at ¶ 56.

The Kohn Certification similarly omits mention of specific instances of religious discrimination. Kohn simply states he received the PIP Results Document, which was "full of erroneous information," after he returned from vacation for Passover. *See* Kohn Certif. at ¶¶ 8, 9. Kohn also states he is an ordained rabbi and discussed with Zaracki that he could not work on the Jewish Holy Days or on the Sabbath. *See id.* at ¶ 12. According to Kohn, Zaracki later falsely testified at her deposition that she did not know he was an observant Jew. *See id.* at ¶¶ 11-14.

Title VII provides, in pertinent part:

> It shall be an unlawful employment practice for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin.

42 U.S.C. § 2000e-2(a). In enacting Title VII, Congress sought to "assure equality of employment opportunities and

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23. As mentioned, the Amended Complaint is unsworn. It therefore has no value in relation to opposing the Summary Judgment Motion and sworn statements of the Defendants. *See* Fed. R. Civ. P. 56(c).

. . . eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." *McDonnell Douglas*, 411 U.S. at 800 (citing, *inter alia*, *Griggs v. Duke Power Co.*, 401 U.S. 424, 429 (1971)). Congress, however, did not intend Title VII

> 'to guarantee a job to every person regardless of qualifications . . . . Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications.'

Id. at 800-01 (quoting *Griggs*, 401 U.S. at 430-31).

As discussed, claims of unlawful discrimination under Title VII must be evaluated pursuant to the *McDonnell Douglas/Burdine* burden-shifting scheme. Before the burden of production shifts to the defendant-employer to articulate a legitimate, nondiscriminatory reason for terminating the plaintiff-employee, the plaintiff bears the burden of establishing a *prima facie* case of discrimination under Title VII. *See Hicks*, 509 U.S. at 506; *Burdine*, 450 U.S. at 254; *McDonnell Douglas*, 411 U.S. at 802.

As explained below, it appears Kohn has not stated a *prima facie* case of discrimination under Title VII. Consequently, WPC and AT&T need not come forward with

a legitimate, nondiscriminatory reason for terminating his employment. *See Spangle v. Valley Forge Sewer Auth.*, 839 F.2d 171, 174 (3d Cir. 1988) ("Where the plaintiff is unable to establish a *prima facie* case, no inference of discrimination is raised and defendants have no burden to proffer a reason for its action."). Nevertheless, as discussed below, the repeated failures of Kohn to remedy his performance deficiencies provide sufficient, non-pretextual justification for his termination under Title VII.

Preliminarily, the Defendants do not contest Kohn, a member of the Jewish faith, is part of a "protected class." *See* Moving Brief at 12 n.6. The Defendants instead focus on the second element of the *prima facie* case, arguing:

> Kohn failed to improve his unsatisfactory work performance, despite being repeatedly advised that he needed to do so . . . . [I]t is clear that Kohn was not performing his job duties 'at a level that met the employer's legitimate expectations[.]'

Id. at 13 (quoting *Turner*, 901 F.2d at 342).

Kohn admits he failed to perform various tasks assigned to him, and offers excuses for his failure to do so. In this regard, he states the "questionable legality" of negotiating an IGD and compiling prices precluded his timely completion of these tasks or of the PIP. *See* Kohn Certif. at ¶ 4. Kohn, however, refused to complete these assignments even after WPC and AT&T assured him there would be no attendant legal implications. *See id.* at ¶ 16 (citing 29 October 1996 Memorandum). The 29 October 1996 Memorandum from Zaracki to Kohn stated, in pertinent part:

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> We have already discussed the legal issue that you raise. There isn't one. If a meeting is required [to discuss Kohn's allegations of illegality], then you better set it up. Regardless of the outcome or scheduling conflicts, the due date for completion of this project is still the same.
>
> Sam, this project has been clearly identified in your objectives since April. You have had plenty of time to work the issues associated with the project. The deliverables are overdue and this project is not yet completed. The due date for completion of this project is 11/22. I would strongly recommend that you focus your energies on completing this work per my instructions instead of creating new blocking issues and asking me to make your decisions for you.

29 October 1996 Memorandum.

Kohn offers other excuses as well, asserting, among other things, Zaracki had extended the deadline for the price analysis beyond the dates set forth in the PIP. *See* Kohn Certif. at ¶ 32. The PIP Results Document submitted by the Defendants indicates the original deadline for completing the price analysis was extended by ten days. *See* PIP Results Document. The PIP Results Document also reveals that Kohn failed to meet this extended deadline as well. *See id.* Significantly, Kohn does not dispute he missed the extended deadline for completing the price analysis.

In contrast to the weak excuses offered by Kohn, the Defendants submitted several documents indicating Kohn

was not performing his job duties at an acceptable level, despite ample guidance and feedback from his supervisors. It appears Zaracki provided Kohn with the Career Plan Summary, the Coaching/Feedback Document, the Development Plan, the Illustrative Examples Document and the Performance Appraisal all well in advance of his termination in May 1997. It appears all of these documents clearly delineated the tasks required of Kohn and set forth guidelines for appropriate office behavior. It further appears Zaracki informed Kohn in August 1996, and again in the October 1996 Feedback Session, that his interpersonal and job-related skills needed to improve. Finally, it appears from the PIP Document and PIP Results Document that Kohn was again made aware of the tasks and skills needed to avoid termination, but failed to successfully complete meet most of the tasks or conform his behavior accordingly. *See* PIP Document; PIP Results Document.

Kohn fails to proffer any credible evidence indicating his performance was at a level which met the legitimate expectations of WPC or AT&T. In opposition to the Summary Judgment Motion, he argues:

> [W]e submit, the credible evidence will show that [Kohn] was performing his job properly, and that he was fired because of the discrimination against him . . . .

Opposition Brief at 3. Mere reliance of conclusory arguments will not establish a genuine issue of material fact. *See Maguire v. Hughes Aircraft Corp.*, 912 F.2d 67, 72 (3d Cir. 1990); *Schoch v. First Fidelity Bancorp.*, 912 F.2d 654,

657 (3d Cir. 1990); *Cigarrera La Moderna v. Inventory Mgmt. Consultant Group, Ltd.*, No. 95-1788, 1998 WL 419460, at *3 (D.N.J. 20 July 1998).

In further opposition to summary judgment, counsel for Kohn states the case "will turn on the credibility of Kamie Zaracki versus that of [Kohn]." Freedman Certif. at ¶ 3; *see also* Opposition Brief at 2. In light of the documents proffered by the Defendants which support the statements of Zaracki, there is no genuine issue of material fact as to the credibility of Zaracki concerning Kohn's job performance. As stated, Kohn concedes he was not performing various job assignments. In addition, that Zaracki may have been aware Kohn is Jewish, as Kohn asserts, is irrelevant absent any credible evidence of discriminatory animus.

Beeause Kohn has not met his burden of establishing a *prima facie* case of religious discrimination, the Defendants need not articulate a legitimate, nondiscriminatory reason for terminating his employment. *See Hicks*, 509 U.S. at 507; *Burdine*, 450 U.S. at 254; *McDonnell Douglas*, 411 U.S. at 802; *Lawrence*, 98 F.3d at 66; *Spangle*, 839 F.2d at 174. As explained, however, the Defendants have nevertheless articulated legitimate, nondiscriminatory reasons for terminating Kohn, namely, his repeated failures to remedy the deficiencies in his work performance and, ultimately, his failure to meet the terms of the PIP. As discussed, Zaracki repeatedly alerted Kohn to problems with his job performance and advised him he needed to improve his job-related skills. Despite denials by Kohn that such problems existed, the submissions of the Defendants reveal the problems were well-documented.

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As discussed, to survive a summary judgment motion, Kohn must come forward with facts or inferences logically flowing from such facts which discredit the proffered legitimate, nondiscriminatory reasons of WPC and AT&T for his termination. *See Simpson*, 142 F.3d at 644; *Lawrence*, 98 F.3d at 66; *Sempier*, 45 F.3d at 731. Kohn, however, simply argues in conclusory fashion: "On this summary judgment motion, we submit that [Kohn] has established, as the minimum, that the stated reason [for his termination] is a pretext. The motion should be denied." Opposition Brief at 3. Critically, Kohn points to no evidence, direct or circumstantial, suggesting the legitimate, nondiscriminatory reasons proffered by the Defendants are a pretext for religious discrimination.

It appears, moreover, Kohn was not terminated until repeated efforts by the Defendants to remedy his performance deficiencies proved unfruitful. The Defendants gave Kohn ample opportunity to improve his work performance. In any event, whether the decision of WPC to fire Kohn was prudent or wise is irrelevant; Kohn must offer evidence, direct or circumstantial, to demonstrate the decision was "weak, implausible, contradictory, or coherent" or that discriminatory animus was the likely impetus for the decision. *See Silvestre v. Bell Atlantic Corp.*, 973 F.Supp. 475, 483 (D.N.J.) (quoting *Fuentes*, 32 F.3d at 765), *aff'd*, 156 F.3d 1225 (3d Cir. 1998).

Although the evidence must be viewed in the light most favorable to Kohn, *see Matsushita*, 475 U.S. at 587, Kohn has not submitted any evidence, under oath or otherwise, to demonstrate religious discrimination. The unsupported, conclusory allegations of Kohn do not create a genuine issue

of material fact. *See Schoch*, 912 F.2d at 657. Accordingly, summary judgment is granted in favor of AT&T and WPC as to the Title VII claims of Kohn.

2. *The ADEA*

Kohn additionally alleges he was terminated in violation of the ADEA. In support of this claim, Kohn alleges a single fact: he is fifty-two years old. *See* Amended Complaint at ¶ 3.

The ADEA was enacted in 1967 "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b). The ADEA is intended to further the dual goals of compensating victims of discrimination and deterring employers from discriminating against older workers. *Long v. Sears Roebuck & Co.*, 105 F.3d 1529, 1541 (3d Cir.), *cert. denied*, __ U.S. __, 118 S.Ct. 1033 (1998). The ADEA makes it illegal for employers to refuse to hire, to fire or to discriminate against an employee "with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1) ("Section 623").[24] A cause of

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24. Section 623 provides in pertinent part:

> It shall be unlawful for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with

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action under the ADEA is limited to plaintiffs who are at least forty years of age. 29 U.S.C. § 631.

To recover in an age discrimination suit, a plaintiff must prove, by a preponderance of the evidence, age was a determinative factor in the employment decision at issue. *Billet*, 940 F.2d at 816; *Bartek v. Urban Redevelopment Auth. of Pittsburgh*, 882 F.2d 739, 742 (3d Cir. 1989). A plaintiff, however, is not required to prove "that age was the sole or exclusive reason, but rather that 'age made a difference' in the employer's decision." *Billet*, 940 F.2d at 816 (citation omitted).

As discussed, age discrimination claims are governed by the burden shifting analysis enunciated in *McDonnell Douglas*, 411 U.S. 792, refined in *Burdine*, 450 U.S. at 252-53 and clarified in *Hicks*, 509 U.S. 506. *See Hicks*, 509 U.S. at 506; *Simpson*, 142 F.3d at 643 (citing *Sempier*, 45 F.3d at

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> respect to his [or her] compensation, terms, condition, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his [or her] employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his [or her] status as an employee, because of such individual's age; or
>
> (3) to reduce the wage rate of any employee in order to comply with this chapter.

29 U.S.C. § 623(a).

728); *Johnson v. Penske Truck Leasing Co.*, 949 F.Supp. 1153, 1170-71 (D.N.J. 1996). Kohn has not come forward with any evidence, direct or circumstantial, to support his claims of age discrimination; a careful review of the submissions, moreover, reveals no such evidence.

To establish a *prima facie* case of age discrimination, Kohn must establish (1) he is forty years of age or older and therefore belongs to a protected class, (2) he was qualified for the position from which he was discharged, (3) he was dismissed notwithstanding his qualifications and (4) he was replaced by an individual sufficiently younger to permit an inference of discrimination. *Armbruster v. Unisys Corp.*, 32 F.3d 768, 777 (3d Cir. 1994) (citing *Burdine*, 450 U.S. at 253 and *McDonnell Douglas*, 411 U.S. at 802).

It is undisputed Kohn falls within the protected age group under the ADEA. *See* Moving Brief at 12 n.6. As discussed in conjunction with his Title VII claim, however, Kohn has not even alleged facts indicating he was dismissed by WPC because of his age, despite being qualified. *See* Amended Complaint. The Amended Complaint is devoid of any specific examples of age discrimination; it merely alleges Kohn is fifty-two years old. *See id.* at ¶ 3.

Kohn also has not indicated in any of his submissions that he was replaced by an individual sufficiently younger, permitting an inference of discrimination. The Opposition Brief and the Kohn Certification do not even mention age or any facts hinting at age discrimination. *See* Opposition Brief. That Kohn is fifty-two years old does not create a genuine issue of material fact. As discussed, mere conclusory

allegations of age discrimination are insufficient to survive a properly supported motion for summary judgment. *See Maguire*, 912 F.2d at 72; *Schoch*, 912 F.2d at 657. Because Kohn has not stated a *prima facie* case of age discrimination, much more demonstrated the legitimate, nondiscriminatory reasons for his termination were pretextual, the ADEA claim against WPC and AT&T is dismissed.

4. *ADD as a Disability Under the ADA*

As indicated, Kohn also alleges WPC and AT&T violated the ADA by discriminating against him by virtue of his ADD. Specifically, Kohn alleges WPC and AT&T were aware Kohn suffered from ADD, but nevertheless failed to provide him with clear objectives and criteria concerning their job expectations for him. *See* Amended Complaint at ¶ 10.

The ADA proscribes "discrimination against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement or discharge of employees, employee compensation, job training and other terms, conditions and privileges of employment." 42 U.S.C. § 12112(a). The term "qualified individual with a disability" refers to a person who, with or without "reasonable accommodation," can perform the essential functions of the employment position that person holds or seeks. 42 U.S.C. § 12111(8).

The *McDonnell Douglas/Burdine* framework described above also applies to the analysis of suits brought under the ADA. *See Walton*, 168 F.3d at 666; *Olson*, 101 F.3d at 951

(citing *Newman*, 60 F.3d at 157). Accordingly, Kohn bears the burden of establishing a *prima facie* case of unlawful disability discrimination. *See id.*

To establish a *prima facie* case of disability discrimination under the ADA, Kohn must prove by a preponderance of the evidence that (1) he belongs to a protected class under the ADA, (2) he was otherwise qualified to perform the essential functions of the position, (3) he was dismissed despite being qualified and (4) he was ultimately replaced by a person sufficiently outside the protected class to create an inference of discrimination. *See Gaul v. Lucent Technologies, Inc.*, 134 F.3d 576, 580 (3d Cir. 1998) (citing *Shiring v. Runyon*, 90 F.3d 827, 831 (3d Cir. 1996)); *Olson*, 101 F.3d at 952; *Lawrence*, 98 F.3d at 68; *Sempier*, 45 F.3d at 728; *Chipollini*, 814 F.2d at 897; *Owen*, 1999 WL 43642, at *4.

At issue in the instant case is whether Kohn falls within the protected class. Resolution of this issue depends on whether the ADD of which Kohn claims to suffer is a "disability" under the ADA. *See Gaul*, 134 F.3d at 580; *Olson*, 101 F.3d at 952.

The ADA defines "disability" to mean:

> (A) a physical or mental *impairment that substantially limits one or more of the major life activities* of . . . [an] individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.

42 U.S.C. § 12101(2) ("Section 12101(2)") (emphasis added). Major life activities include activities such as "caring

for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." 29 C.F.R. § 1630(I). To be considered "substantially limit[ed]" in a major life activity, a plaintiff must be significantly restricted in the performance of the activity, compared to the average person. 29 C.F.R. § 1630.2(j).

Because Kohn has not alleged he has a record of an impairment or that he was regarded as having an impairment, *see* 42 U.S.C. § 12101(2)(B) and (C), he therefore must proffer evidence indicating (1) he suffers from a physical or mental impairment (2) which limits a major life activity (3) *to a substantial degree. See* 42 U.S.C. § 12101(2)(A) (emphasis added); *see also Bercovitch v. Baldwin School, Inc.*, 133 F.3d 141, 155 (1st Cir. 1998).

This Circuit has not squarely addressed whether ADD or the related condition, Attention Deficit-Hyperactivity Disorder ("ADHD"), qualifies as an impairment within the meaning of Section 12101(2).[25] Most courts which have

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25. In *Menkowitz v. Pottstown Memorial Medical Center*, 154 F.3d 113 (3d Cir. 1998), this Circuit held that a plaintiff physician who was diagnosed with ADD was "disabled" within the meaning of the ADA. The court, however, did not analyze whether ADD was a recognized impairment under the ADA. It stated only: "[T]he parties do not dispute on appeal that appellant is 'disabled' as that term is defined in the ADA. The [defendant] hospital in its brief to this court invites us to affirm the district court's dismissal of appellant's [ADA] claim on the ground that he is not disabled within the meaning of 42 U.S.C. § 12102(2) . . . . [W]e decline to accept the hospital's invitation at this stage of the litigation." 154 F.3d at 117 & n.2.

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addressed this issue have concluded that ADD and ADHD qualify as mental impairments under the ADA. *See DeMar v. Car-Freshner Corp.*, No. 97-498, 1999 WL 34973, at *4 (N.D.N.Y. 14 Jan. 1999) (citing *Bercovitch*, 133 F.3d at 155); *Axelrod v. Phillips Academy, Andover*, __ F.Supp.2d __, 1999 WL 219464, at *11 (D.Mass. 12 Apr. 1999); *Bingham v. Oregon School Activities Ass'n*, 37 F.Supp.2d 1189, 1195 (D.Or. 1999); *cf. Davidson v. Midelfort Clinic, LTD.*, 133 F.3d 499, 505-06 (7th Cir. 1998). In so finding, it has been observed:

> Although the relevant regulations do not specifically list ADHD as an included physical or mental impairment, the list is not exhaustive and includes '[a]ny mental or psychological disorder such as mental retardation . . . emotional or mental illness, and specific learning disabilities . . . .' ADHD is not a learning disability per se.
>
> It is listed as a 'mental disorder' in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-IV).

Bercovitch, 133 F.3d at 155 n.18 (quoting 28 C.F.R. § 36.104); *see DeMar*, 1999 WL 34973, at *4.

Whether ADD constitutes a mental impairment within the meaning of the statute is not dispositive of whether ADD

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At least one district court in this Circuit has recognized that ADD can constitute a "disability" under Section 12102(2). *See DiBenedetto v. City of Reading*, No. 96-5055, 1998 WL 474145, at *14 (E.D.Pa. 16 July 1998).

is a disability under the ADA, however. "The ADA does not consider every impaired person to be disabled as defined under the statute." *DeMar*, 1999 WL 34973, at *5. As stated, the ADD must also "substantially limit" a major life activity. *See* 42 U.S.C. § 12101(2)(A).

A person is "substantially limited" in a major life activity when he or she is:

> (i) Unable to perform a major life activity that the average person in the general population can perform; or [is] (ii) Significantly restricted as to the condition, manner or duration under which [he or she] can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.3(j)(1). Where the major life activity involved is working, an individual is substantially limited if he or she is "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." *Id.* § 1630(j)(3)(i). The effects of ADD on a claimant, therefore, must be measured in relation to the performance of an average person having comparable training, skills and abilities. *See Bercovitch*, 133 F.3d at 155-56; *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1454 n.12 (7th Cir. 1995); *Price v. Nat'l Bd. of Medical Examiners*, 966 F.Supp. 419, 427 (S.D.W.Va. 1997) (adopting the "comparison to most people" approach when evaluating whether ADD is a disability under the ADA).

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Impairments which merely affect major life activities must be distinguished from impairments which substantially limit major life activities. *DeMar*, 1999 WL 34973, at *5 (citing *Ryan v. Grae & Rybicki*, 135 F.3d 867, 869-70 (2d Cir. 1998)); *see Knapp v. Northwestern University*, 101 F.3d 473, 481 (7th Cir.) ("Not every impairment that affects an individual's major life activities is a substantially limiting impairment."), *cert. denied*, 520 U.S. 1274 (1997). "[T]he impairment must be significant, and not merely trivial." *Reeves v. Johnson Controls World Servs. Inc.*, 140 F.3d 144, 151 (2d Cir. 1998) (quoting *Sutton v. United Air Lines, Inc.*, 130 F.3d 893, 898 (10th Cir. 1997); *Davidson*, 133 F.3d at 505-06; *Price*, 966 F.Supp. at 424.

The Defendants, citing *Davidson*, 133 F.3d 499 (7th Cir. 1998) and *Jones v. Men's Warehouse*, No. 97-1891, 1999 WL 134210 (N.D.Tx. 10 Mar. 1999),[26] argue: "Kohn may

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26. *Davidson* involved a disability discrimination claim against an employer brought pursuant to the ADA by an employee who suffered from ADD. The Seventh Circuit affirmed, in relevant part, the decision of the district court which granted summary judgment to the defendant employer "for lack of evidence that [the plaintiff employee] presently has a substantially limiting impairment resulting from ADD . . . ." 133 F.3d at 502. Specifically, the court found that ADD did not prevent the plaintiff from engaging in the major life activity of working. *Id.* Recognizing ADD qualifies as an impairment under the ADA, *see id.* at 505, it nevertheless was observed:

> To demonstrate a significant limitation on her ability to work, it is not enough for the plaintiff to show that her impairment prevented [her] from performing one narrow job for one employer . . . . At most, the evidence in this case suggests as a result of ADD, [the plaintiff] was

(Cont'd)

suffer from ADD; however, Kohn's ADD is not a disability under the ADA because there is no evidence that he is unable to perform or is significantly restricted in his performance of a major life activity." Moving Brief at 19.

Kohn, by contrast, argues in his Opposition Brief:

> Defendant's [sic] . . . claim that [ADD] is not a disability under the [ADA], citing the *Davidson* case. But that case ruled that there *was* sufficient evidence to permit the factfinder there to conclude that the impairment substantially limited plaintiff's abilities and qualified as a person with a disability for purposes of the ADA.

(Cont'd)

> unable to perform her job at [defendant-employer]. [The plaintiff] has come forward with no evidence from which one might reasonably infer that ADD precluded her even from holding other comparable positions . . . .

Id. at 506. The court further stated that "[i]n the face of [defendant's] motion for summary judgment, [the plaintiff] needed to identify what requirements posed by the class of . . . jobs (or alternatively, by a broad range of other jobs) were problematic in light of the limitations that ADD imposed on her." *Id.* at 507.

Similarly, in *Jones*, 1999 WL 134210, the district court for the Northern District of Texas granted the summary judgment motion by the defendant employer, holding the plaintiff may have suffered from ADD, but was not "disabled" under the ADA. *Id.* at *3. It was concluded: "[The plaintiff's] ADD is not a disability under the ADA because the record does not show that [the plaintiff] is unable to perform or is significantly restricted as to the condition, manner, or duration under which [the plaintiff] can perform a particular major life activity." *Id.*

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> Curiously, [D]efendants also cite the *Jones* case, although in that case the Court rule first that Jones' discharge claim was barred for failure to exhaust his administrative remedies and Jones submitted no medical or expert testimony supporting his ADD claim.
>
> Here, defendant's [sic] own doctor [Cillo] admitted [Kohn] suffered from a medical condition that required he be treated in a particular manner, which [Kohn] has shown was not followed by Ms. Zaracki. Moreover, [Kohn] has submitted a report from the physician who had been treating him for ADD. Defendants have submitted nothing factual proving that [Kohn] did not suffer from ADD; to the contrary, defendant Zaracki's action have shown her failure to accomodate [sic] [Kohn's] medical condition, as part of her scheme to fire [Kohn].

Opposition Brief at 4. Kohn also submitted a report prepared by Dr. Michael R. Milano, M.D., dated 25 March 1999, (the "Milano Report"). The Milano Report states, in relevant part:

> Mr. Samuel Kohn . . . is a 54 year old man who was first seen by me in conjoint psychotherapy with his now ex-wife in 1981 . . . . During that period and for several years after, Mr. Kohn engaged in weekly psychotherapy which focused largely on the need to comprehend the problems which he had brought to the marriage and to develop new relationship patterns with his

children and others in his personal life . . . . During this time, difficulties in work adaptations were not prominent concerns.

Psychotherapy might have concluded with the resolutions of some of these issues when the focus of therapy shifted to several new areas . . . [F]or the first time, employment issues became paramount in his therapy. From 1995 through his employment termination in 1998 we intensified the focus on Mr. Kohn's Adult Type Attention Deficit Disturbance.

. . .

Mr. Kohn's degree of impairment varied from modestly severe . . . to mild . . . . It was apparent long before this that Mr. Kohn had lifelong ADD and part of earlier psychotherapeutic work had dealt with the impact on his social life . . . . He is currently benefiting [sic] from Paxil 20 mg per day.

Throughout 1998, Mr. Kohn was profoundly concerned with the job problems that ultimately led to his termination. We discussed and tried to implement behavioral modifications that would optimize his performance. I had one lengthy phone conversation with Dr. Cillo where we reviewed some specific recommendations, such as: Try to make instructions clear and unambiguous. Help Mr. Kohn to be more directed and terse in

> his communication. Ignore a degree of messiness and non corporate dress that were minor manifestation. Be patient in clarifying issues of misunderstanding. Finally, ADD can be both a liability and an asset, and look for creative contributions.
>
> From mid 1997 on, work related issues have dominated the therapy. Mr. Kohn has worked to minimize the psychological damage from his termination and to continue to improve his functioning as an individual despite major cardiac surgery and the stresses he has described relating to work. When he completes his cardiac rehabilitation I would see him highly qualified for the work he has done.

Milano Report.[27]

Viewing the facts in a light most favorable to Kohn, it nevertheless appears Kohn does not suffer from a "disability" within the meaning of the statute. Specifically, Kohn has not adduced facts indicating he was substantially limited in performing a major life activity, namely, his job duties and responsibilities.

Contrary to the conclusory assertions of Kohn, the condition of ADD, in itself, does not create a genuine issue of material fact as to whether Kohn is "disabled" under the ADA. *See Davidson*, 133 F.3d at 506; *Jones*, 1999 WL

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27. A copy of the Milano Report is attached to the Kohn Certification as Exhibit 6.

134210, at *3; *DeMar*, 1999 WL 34973, at *6. Critically, Kohn has not offered evidence comparing his ability to work with that of the average person. *See* 29 C.F.R. § 1630(j); *see also DeMar*, 1999 WL 34973, at *6 ("Notably absent from Plaintiff's allegations are specific facts or evidence demonstrating that Plaintiff is substantially limited in his ability to concentrate [or work by virtue of ADD] in comparison to the general population .... [N]either 'conclusory statements, conjecture, [n]or speculation' suffices to defeat summary judgment."); *Davidson*, 133 F.3d at 506. That the "Defendants have submitted nothing factual proving that [Kohn] did not suffer from ADD[,]" Opposition Brief at 4, is irrelevant absent proof the ADD was substantially limiting as compared with the average person having comparable training, skills and abilities.

Kohn also has not identified which of his job requirements were rendered significantly more difficult because of the unarticulated limitations alleged to have been imposed on him by virtue of having ADD. *See Davidson*, 133 F.3d at 507 ("In the face of [Defendant's] motion for summary judgment, [plaintiff] needed to identify what requirements posed by the class of . . . jobs (or, alternatively, by a broad range of other jobs) were problematic in light of the limitations that ADD imposed upon her.").[28] Kohn has

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28. Curiously, Kohn attempts to distinguish *Davidson* on the grounds that in that case, the Seventh Circuit deemed the plaintiff disabled. There, the court only denied summary judgment as to the secondary issue of whether the plaintiff had produced enough evidence permitting a factfinder to reasonably conclude she had a history of an impairment substantially limiting her ability to *learn*.

(Cont'd)

not demonstrated his ADD precluded him from performing specific duties as Manager of Pricing and Business Analysis or from holding other comparable positions.

The Milano Report also does not establish Kohn is significantly restricted in his ability to perform as Manager of Pricing and Business Analysis or a class of jobs, as compared to the average person having comparable training, skills and abilities. *See* 29 C.F.R. § 1630(j). It states only that Kohn suffers from ADD, which, as discussed, is insufficient absent proof of substantial limitations on his job performance. Consequently, Kohn has not adduced facts evidencing an inability to perform or any significant restrictions as to the condition, manner, or duration under which he can work. *See Jones*, 1999 WL 134210, at *3 (holding plaintiff's ADD did not substantially limit him, where plaintiff did not offer evidence indicating he was unable to perform or was significantly restricted in any way).

Because Kohn has not demonstrated he is disabled within the meaning of the ADA, WPC and AT&T need not demonstrate they provided Kohn with reasonable accommodations. Pursuant to 42 U.S.C. § 12112(b), discrimination includes:

> [N]ot making reasonable accommodations to the known physical or mental limitations of an

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(Cont'd)
See 133 F.3d at 507. As stated, however, the court also concluded the plaintiff, who had ADD, was *not* substantially limited in the major life activity of *working*. *See id.* at 506-07. As discussed, Kohn does not provide facts sufficient to compel a different conclusion.

> otherwise qualified individual *with a disability* who is an applicant or employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such [employer].

42 U.S.C. § 12112(b)(5)(A) (emphasis added); *see Walton*, 168 F.3d at 670; *see also* 29 C.F.R. § 1630.9 ("[I]t is the responsibility of the individual *with a disability* to inform the employer that an accommodation is needed.") (Emphasis added).

In any event, it appears WPC and AT&T provided Kohn with clear objectives and criteria concerning job expectations as early as October 1996. As discussed, in February 1997, Dr. Cillo recommended Kohn be given "a clear statement about productivity and the outcome expected; a clear set of objectives and milestones. This would certainly involve a formal performance improvement plan with well-understood time-bound goals." Cillo Evaluation. Following these recommendations, Zaracki provided Kohn the PIP Document, which clearly set forth objectives and milestones. *See* PIP Document. Specifically, the PIP Document delineated, among other things, the following "developmental benchmarks" and "deliverables" to which Kohn should have adhered:

DEVELOPMENT BENCHMARKS

- Complete project deliverables on time
- Work review process into the planning timeline

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- Develop/use written project plan with milestones, DD, individual responsible as mechanism to communicate project progress
- Written meeting minutes with deliverables noted and distributed to team members
- Take initiative to work objectives and find solutions to blocking issues, proactively reviews with supervisor
- Proactive follow-up with others to ensure project deliverables met
- Take initiative to find 'parallel examples' to use as models in developing outputs

. . .

DELIVERABLES

1. Continue on-going deployment support of:
   - Alestra
   - CAT
   - Indosat
   - Telecom Malaysia
   - AT&T Canada

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This includes but is not limited to providing pricing tutorials as needed, responding to ad hoc price questions, proofing Member input to FR and PL price books to ensure quality.

2. Complete Price Book update process for FR and PL by 4/1/97 . . . .

3. Participate in Ongoing Win/Loss Reviews This includes successful completion of any work items resulting from the process. [Kohn] should provide courtesy copies of his responses to work assignments from these meetings to his supervisor.

4. Complete Development Of The WorldSource℠ Services Pricing Strategy document by 4/20/97 . . . .

5. Complete Competitive Price Analysis including appropriate Member recommendations on WorldSource℠ PL by 4/20/97 . . . .

6. Develop suggested price structure for WorldSource Toll Free Service by 4/20/97.

Id. The PIP Document additionally listed skills Kohn needed to master to be a successful Manager of Pricing and Business Analysis:

- Good organizing and planning skills of self, others, projects

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- Sets clear direction for self and others consistent with job objectives
- Plans in advance — both for primary output and contingency plans
- Makes timely decisions appropriate to team and job scope
- Helps others achieve their goals and objectives
- Demonstrates interpersonal flexibility
- Moves concepts from theory to practical application and outputs
- Demonstrates support of management direction and priorities

Id. The PIP Document also listed the managerial responsibilities of Kohn:

> [Kohn] shall be responsible for carrying out all phases of the pricing and business analysis projects assigned to him. This includes but is not limited to:
>
> - Ongoing Member deployment and certification support
> - FR and PL Price Book updates and distribution to the required individuals

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- Development of pricing strategy document, updates and revisions based on supervisor(s) input

- Conducting price analysis with recommendations on WorldSource PL

- Ongoing participation in win/loss review process

- Develop price structures and supporting documentation for WorldSource Toll Free Service (Freephone).

Id.

The conclusory allegations of Kohn that the PIP objectives "were not clearly defined," Kohn Certif. at ¶ 23 and "were very general, confusing and not objectively and specifically measurable," Amended Complaint at ¶ 62, are unpersuasive in light of the straightforward criteria set forth in the PIP Document.

It appears, moreover, Kohn never requested any specific accommodations. *See* 29 C.F.R. § 1630; *see also Kaltenberg v. College of Podiatric Medicine*, 162 F.3d 432, 437 (6th Cir. 1998) ("[T]he [Defendant] was not obligated to provide accommodation until plaintiff had provided a proper diagnosis of ADHD and requested a specific accommodation."). Zaracki testified that Kohn never provided his supervisors with any specific direction as to the nature and type of accommodations he required.

See Deposition of Zaracki, dated 22 March 1999, (the "Zaracki Dep.") at 67:14-15.[29] Kohn has not proffered any evidence indicating otherwise. The conclusory allegations of Kohn, without more, are insufficient to overcome the Summary Judgment Motion. *See Maguire*, 912 F.2d at 72; *Schoch*, 912 F.2d at 657; *La Moderna*, 1998 WL 419460, at *3.[30]

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29. Relevant portions of the Zaracki Deposition are attached to the Reilly Affidavit as Exhibit B.

30. The Amended Complaint also alleges the Defendants did not "reasonably accomodate [sic] [Kohn's] heart disease." Amended Complaint at ¶ 49. It is further alleged: "[Kohn] during this time was required by Ms. Zaracki and Mr. Leasure to do stressful work with unclear and contradictory requirements provided by Ms. Zaracki, working more than 60 hours per week . . . ." *Id.* at ¶ 51. Kohn may not rest on his unverified Amended Complaint to oppose the Summary Judgment Motion. *See* Fed. R. Civ. P. 56(c).

Neither Kohn nor the Defendants directly address these allegations concerning Kohn's heart disease on summary judgment; the submissions address only his alleged ADD. As discussed, however, the Defendants urge the general application of the *McDonnell Douglas/Burdine* framework to all of his disability discrimination claims under the ADA. *See* Moving Brief at 11-15; Reply Brief at 3-9; *see also Walton*, 168 F.3d at 666; *Olson*, 101 F.3d at 951 (citing *Newman*, 60 F.3d at 157) ("It is now axiomatic that the familiar analytical framework first pronounced in [*McDonnell Douglas*] for resolution of suits brought under Title VII, also guides an analysis of claims brought under the ADA."). Applying this framework to his conclusory allegations that the Defendants failed to accommodate his heart disease, it appears Kohn cannot state a *prima facie* case of discrimination under the ADA.

(Cont'd)

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C. *Liability of Individual Defendants Under Title VII, the ADEA and the ADA*

The Defendants further argue: "There is no basis in law for holding [D]efendants Zaracki and Leasure individually liable under Title VII, ADEA or the ADA." Moving Brief at 21; *see* Reply Brief at 12.

" '[I]n the context of employment discrimination, the ADA, ADEA and Title VII all serve the same purpose — to prohibit discrimination in employment against members of certain classes.' " *Walton*, 168 F.3d at 666 (quoting *Newman*, 60 F.3d at 157); *see DeJoy v. Comcast Cable Communications, Inc.*, 941 F.Supp. 468, 473 (D.N.J. 1996). Courts, including the Third Circuit, routinely use the case law under all three statutes interchangeably. *Walton*, 168 F.3d at 666; *DeJoy*, 941 F.Supp. at 474.

(Cont'd)

Specifically, as stated, Kohn has not met his burden of demonstrating he met the legitimate expectations of his employer. *See Burdine*, 450 U.S. at 252-53. Kohn, moreover, has not adduced facts establishing his heart disease places him in a "protected class." *See Olson*, 101 F.3d at 952 (requiring plaintiff suing under the ADA to first show he is a member of a protected class under the *McDonnell Douglas/Burdine* framework). In this regard, Kohn has not offered any evidence indicating his alleged heart disease constituted a physical impairment which substantially limited him in a major life activity. *See* 42 U.S.C. § 12102(2). Nor has Kohn alleged, much more established, he has a record of such impairment or was regarded as having such an impairment. *See id.* Reviewing the unsupported allegations concerning his alleged heart disease pursuant to the *McDonnell Douglas/Burdine* framework, it appears Kohn cannot survive summary judgment as to these claims as well. *See* Fed. R. Civ. P. 56(c).

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When addressing the question of individual liability under these statutes, therefore, case law interpreting any of these statutes is relevant. *See Stults v. Conoco, Inc.*, 76 F.3d 651, 655 (5th Cir. 1996); *Williams v. Banning*, 72 F.3d 552, 553 (7th Cir. 1995); *Matthews v. Rollins Hudig Hall Co.*, 72 F.3d 50, 52 n.2 (7th Cir. 1995) (dicta); *Thelen v. Marc's Big Boy Corp.*, 64 F.3d 264, 267 n.2 (7th Cir. 1995) (dicta); *EEOC v. AIC Sec'y Investigations, Ltd.*, 55 F.3d 1276, 1280 (7th Cir. 1995); *Smith v. Lomax*, 45 F.3d 402, 403 n.4 (11th Cir. 1995); *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583, 587 (9th Cir.), *cert. denied*, 510 U.S. 1109 (1994); *Fullman v. Philadelphia Int'l Airport*, __ F.Supp.2d __, No. 98-3674, 1999 WL 310639, at *4 (E.D.Pa. 12 May 1999); *Cohen v. Temple Physicians, Inc.*, 11 F.Supp.2d 733, 736 (E.D.Pa. 1998) (citing *DeJoy*, 941 F.Supp. at 474).

The Title VII, ADA and ADEA definitions of "employer" are virtually identical. Title VII provides for liability for discriminatory conduct against a "person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such a person." 42 U.S.C. § 2000e. The term "employer" under the ADA is similarly defined as "a person engaged in an industry affecting commerce who has fifteen or more employees . . . [or] any agent of such a person . . . ." 42 U.S.C. § 12111(5)(A); *see also Sheridan v. E.I. DuPont de Nemours & Co.*, 74 F.3d 1439, 1996 WL 36283, at *13 (3d Cir.), *vacated on other grounds*, 74 F.3d 1439 (3d Cir. 1996) (en banc) (observing ADA definition concerning who can be held liable "mirror [those] of Title VII"); *Fitzpatrick v. Commonwealth of Pa.*, No. 99-64, 1999 WL 164476, at *5 (E.D.Pa. 25 Mar. 1999) ("[T]he ADA's definition of 'employer[ ]' . . . is in relevant

respects identical to Title VII's definition."). Likewise, the ADEA defines "employer" as "a person engaged in an industry affecting commerce who has twenty or more employees . . . [or] any agent of such a person." 29 U.S.C. § 630(b); *see also Martin v. United Way of Erie County*, 829 F.2d 445, 448 (3d Cir. 1987) (observing similarities in definitions of "employer" in ADEA and Title VII); *EEOC v. Zippo Mfg. Co.*, 713 F.2d 32, 38 (3d Cir. 1983). These statutes do not contain similar provisions providing for liability against an individual employee.

Several courts of appeals have considered the question of individual employee liability in cases under the ADA, ADEA and Title VII. The majority of these courts have rejected the concept of employee liability. *See, e.g.*, *Wathen v. General Elec. Co.*, 115 F.3d 400, 405 (6th Cir. 1997) (Title VII); *Mason v. Stallings*, 82 F.3d 1007, 1009 (11th Cir. 1996) (ADA); *Stults*, 76 F.3d at 655 (ADEA), *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313-17 (2d Cir.1995) (Title VII); *Gary v. Long*, 59 F.3d 1391, 1399 (D.C. Cir.) (Title VII), *cert. denied*, 516 U.S. 1011 (1995); *AIC Sec'y Investigations*, 55 F.3d at 1279-82 (ADA); *Cross v. Alabama*, 49 F.3d 1490, 1504 (11th Cir.) (Title VII and ADA), *reh'g denied*, 59 F.3d 1248 (11th Cir. 1995); *Smith*, 45 F.3d at 403 n.4 (Title VII and ADA); *Birbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 510-11 (4th Cir.) (ADEA), *cert. denied*, 513 U.S. 1058 (1994); *Grant v. Lone Star Co.*, 21 F.3d 649, 653 (5th Cir.) (Title VII), *cert. denied*, 513 U.S. 1015 (1994); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1125 (10th Cir. 1993) (Title VII); *Miller*, 991 F.2d at 587 (Title VII and ADEA); *Busby v. City of Orlando*, 931 F.2d 764, 772 (11th Cir. 1991) (Title VII).

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District court decisions in this Circuit have similarly rejected individual employee liability under these statutes. *See Fullman*, 1999 WL 310639, at *4 (listing cases in the Third Circuit which have held individual employees cannot be held liable under the ADA); *Johnakin v. City of Philadelphia*, No. 95-1288, 1996 WL 18821, at *6 (E.D.Pa. 18 Jan. 1996) (listing cases in the Third Circuit which have limited liability to the employer); *see also Cohen*, 11 F.Supp.2d at 736-37; *Clarke v. Whitney*, 907 F.Supp. 893, 895 (E.D.Pa. 1995); *Ascolese v. SEPTA*, 902 F.Supp. 533, 538 (E.D.Pa. 1995); *Clark v. Commonwealth of Pa.*, 885 F.Supp. 694 (E.D.Pa. 1995); *Caplan v. Fellheimer Eichen Braverman & Kaskey*, 882 F.Supp. 1529, 1531 (E.D.Pa. 1995); *Verde v. City of Philadelphia*, 862 F.Supp. 1329, 1334-1335 (E.D.Pa. 1994); *Crawford v. West Jersey Health Sys.*, 847 F.Supp. 1232, 1237 (D.N.J. 1994); *Violanti v. Emery Worldwide A-CF Co.*, 847 F.Supp. 1251, 1256-57 (M.D.Pa. 1994). *But see Bishop v. Okidata*, 864 F.Supp. 416, 423 (D.N.J. 1994) (holding the plain language of the ADA subjects supervisory employees, who are agents of the employer, to liability and the distinction between "individual" and "official" liability should be abandoned in ADA cases); *Doe v. Shapiro*, 852 F.Supp. 1246, 1253 (E.D.Pa. 1994).

The Third Circuit has not addressed the issue of individual liability under the ADA or the ADEA. It has, however, addressed the issue of individual liability under Title VII. In *Sheridan v. E.I. duPont de Nemours and Co.*, 74 F.3d 1439 (3d Cir.), *vacated*, 74 F.3d 1459 (3d Cir. 1996).

In *Sheridan*, the plaintiff, a hotel employee, asserted the district court had erred by dismissing her Title VII claims

against the general manager of the hotel. 1996 WL 36283 at *12. The plaintiff argued, because the term "employer" is defined to include "any agent" of an employer and the hotel general manager was an "agent" of the hotel, the hotel general manager could be held personally liable under Title VII. *Id.* The Third Circuit, in rejecting the argument of the plaintiff, "follow[ed] the great weight of authority from other courts of appeals" and held "an employee cannot be sued." *Id.* at *13 (citations omitted). In its superceding opinion, the Circuit stated:

> The [plaintiff's] arguments are not without some force. However, the clear majority of courts of appeals that have considered this question have held that individual employees cannot be held liable under Title VII .... [W]e are persuaded that Congress did not intend to hold individual employees liable under Title VII.

Sheridan v. E.I. de Nemours, 100 F.3d 1061, 1077-78 (3d Cir.) (citations omitted), *cert. denied*, 521 U.S. 1129 (1997).

In *Dici v. Commonwealth of Pennsylvania*, 91 F.3d 542 (3d Cir. 1996), the Circuit again addressed the issue of individual liability under Title VII. There, the plaintiff had been denied workers' compensation benefits for "psychic injuries" resulting from alleged sexual and racial harassment. She brought an action under Title VII and Pennsylvania law. *Id.* at 544.

The *Dici* court held the plaintiff could not sustain her Title VII claims against her supervisors. *Id.* at 552. The Circuit stated:

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> When the issue of individual liability was before this court in *Sheridan v. E.I. de Nemours*, 74 F.3d 1439, 1996 WL 36283 (3d Cir. 1996), *vacated*, 74 F.3d 1459 (3d Cir. 1996), the court held that an individual employee cannot be liable under Title VII. The majority opinion . . . noted the great weight of authority from other courts of appeals holding an employee cannot be sued under Title VII . . . .
>
> The *Sheridan* opinion was withdrawn when the court voted to take the case *en banc* . . . . However, the principal focus of the *en banc* briefs and arguments was on Title VII issues other than individual liability. In light of this, we conclude, for the reasons previously given by the court in *Sheridan* and the other courts of appeals, that individual employees cannot be held liable under Title VII.

Id.; *see also Galbraith v. Lenape Regional High School Dist.*, 964 F.Supp. 889, 897 n.5 (D.N.J. 1997); *Caldwell v. KFC Corp.*, 958 F.Supp. 962, 971 (D.N.J. 1997); *DeJoy*, 941 F.Supp. at 473-75.

Significantly, Kohn ignores the settled law in this Circuit concerning individual liability under Title VII. He weakly asserts:

> We found no definitive ruling by the Supreme Court as to whether individuals have liability under Title VII, the ADEA or the ADA. While

> we believe the individuals fall under the strict wording of the statute, as an 'agent' of the employer, we recognize the position taken by the Third Circuit and simply wish to leave the matter open should the Supreme Court definitively decide the question.

Opposition Brief at 4-5. The Third Circuit authority, however, is dispositive of this issue. As indicated, moreover, the ADA and the ADEA similarly define "employer" and share the same basic purpose as Title VII — " 'to prohibit discrimination in employment . . . .' " *Walton*, 168 F.3d at 666 (quoting *Newman*, 60 F.3d at 157). The Title VII, ADEA and ADA claims asserted in the Amended Complaint cannot be sustained as against Zaracki and Leasure. Accordingly, summary judgment in favor of Zaracki and Leasure is granted as to these claims.

Based upon the foregoing, it appears there are no genuine issues of material fact precluding the entry of summary judgment on all of the Federal claims of Kohn.

D. *State Law Claims*

As indicated, Kohn has alleged violations of Title VII, the ADA and the ADEA, which provided the basis for removal jurisdiction. Supplemental jurisdiction existed over his State law Claims for CEPA violations and defamation pursuant to 28 U.S.C. § 1367 ("Section 1367").

Supplemental jurisdiction enables Federal courts to hear State law claims over which there is no independent basis of jurisdiction. *See* 28 U.S.C. § 1367; *Lee-Patterson v.*

New Jersey Transit Bus Operations, Inc., 957 F.Supp. 1391, 1403-04 (D.N.J. 1997) (citing *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 349 (1988)). Supplemental jurisdiction depends upon the existence of subject matter jurisdiction over other claims in the action. Pursuant to Section 1367, the "district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy . . . ." 28 U.S.C. § 1367(a); *see also Sinclair v. Soniform, Inc.*, 935 F.2d 599, 603 (3d Cir. 1991).

Section 1367(c) permits a court to decline to exercise supplemental jurisdiction when "the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3); *see also Carnegie- Mellon*, 484 U.S. at 350 ("When the [F]ederal-law claims have dropped out of the lawsuit in its early stages and only [S]tate-law claims remain, the [F]ederal court should decline the exercise of jurisdiction by dismissing the case without prejudice.") (footnote omitted); *Fuentes v. South Hills Cardiology*, 946 F.2d 196, 198 n.3 (3d Cir. 1991) (dismissal of "pendent [S]tate law claim[ ]" proper where [F]ederal claims dismissed for lack of subject matter jurisdiction).

As discussed, the Title VII, ADA and ADEA claims raised against the Defendants have been dismissed. Because no other ground for Federal jurisdiction is alleged,[31]

31. Because it appears that Kohn and the Defendants are residents of New Jersey, *see* Amended Complaint at ¶¶ 2-4; Notice of Removal at 1 and ¶ 2, diversity jurisdiction is lacking. *See* 28 U.S.C. § 1332(a). Kohn, moreover, has alleged no independent basis for jurisdiction over the remaining State law claims. *See* Amended Complaint at ¶ 83.

the remaining claims are dismissed without prejudice. *See* 28 U.S.C. § 1367(c)(3); *Lee-Patterson*, 957 F.Supp. at 1403 (citing *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966)).

Conclusion

For the reasons set forth above, the Summary Judgment Motion is granted. An order accompanies this opinion.

s/ Alfred J. Lechner, Jr.
ALFRED J. LECHNER, JR., U.S.D.J.

Appendix B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 99-102 (AJL)

SAMUEL KOHN,

Plaintiff,

v.

AT&T CORP., THE WORLDPARTNERS COMPANY, BRUCE LEASURE, and KAMIE ZARACKI,

Defendants.

ORDER

This matter having come before the court by way of the motion for summary judgment (the "Motion") filed by defendants AT&T Corp., The WorldPartners Company, Bruce Leasure and Kamie Zaracki (collectively, the "Defendants"), and the court having considered the submissions of the parties, and for the reasons set forth in a Letter-Opinion filed on this date, and for good cause shown,

IT IS, on this 21st day of June 1999,

ORDERED, that the Motion be and hereby is granted, and it is further

ORDERED, that this matter be and hereby is dismissed.

s/ Alfred J. Lechner, Jr.
ALFRED J. LECHNER, JR., U.S.D.J.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DENYING MOTION FOR RECONSIDERATION DATED AND FILED JULY 20, 1999 AND ENTERED JULY 21, 1999

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 99-102 (AJL)

SAMUEL KOHN,

Plaintiff,

v.

AT&T CORP., THE WORLDPARTNERS COMPANY, BRUCE LEASURE, and KAMIE ZARACKI,

Defendants.

ORDER

This matter having come before the court by way of a motion for reconsideration (the "Motion for Reconsideration") plaintiff Samuel Kohn ("Kohn"), pursuant to L. Civ. R. 7.1(g) and by Fed. R. Civ. P. 59(e), and the Motion for Reconsideration having requested reconsideration of an order and opinion, filed 22 June 1999, (the "22 June 1999 Order and Opinion"), and the 22 June 1999 Order and Opinion having granted the motion of defendants AT&T, The Worldpartners Company, Bruce Leasure and Kamie Zaracki (collectively, the "Defendants") for summary judgment

(the "Summary Judgment Motion") pursuant to Fed. R. Civ. P. 56 ("Rule 56"), and it appearing the Motion for Reconsideration does not raise any dispositive factual matters or controlling decisions of law which were not previously considered, but mainly reiterates the conclusory arguments set forth in the submissions in opposition to the Summary Judgment Motion, and it further appearing a motion for reconsideration is not a "vehicle to reargue the motion," *Bermingham v. Sony Corp. of Am., Inc.*, 820 F.Supp. 834, 856 (D.N.J.), *aff'd mem.*, 37 F.3d 1485 (3d Cir. 1994),

and it further appearing Kohn and his attorney, Allan P. Freedman, Esq., opposed the Summary Judgment Motion with unsworn certifications which failed to acknowledge the data contained therein were submitted under the penalty of perjury,[1] and it further appearing Kohn now argues in support of reconsideration:

> The Court overlooked or misapprehended the fat that New Jersey, like the United States, and certain other states, has set out a certification procedure for documents, which, as the Appellate Division has noted, 'is only another way of swearing or affirming,' without the presence of a notary. *State v. Angelo's Motor Sales*, 125 N.J.Super. 200, 207 (App.Div. 1973), *aff'd sub nom.*, *State v. Parmigiani*, 65 N.J. 154 (1974). That procedure,

1. The Kohn Certification and the Freedman Certification contained the following language: "I certify that the facts set forth herein are true. I am aware that if any of the foregoing facts are willfully false that I am subject to punishment." Kohn Certif. at ¶ 34; Freedman Certif. at ¶ 7.

> set out in New Jersey Rules 1:4-4(b), requires the declarant to say 'I am aware that if anything herein is false, I am subject to punishment.'

Kohn Brief at 2-3, and it further appearing Kohn references only the State standard for certifications, but ignores the settled Federal case law indicating unsworn declarations not expressly filed under the penalty of perjury in Federal court fail to satisfy the requirements of Rule 56, *see, e.g.*, *Small v. Lehman*, 98 F.3d 762, 765 n.5 (3d Cir. 1996) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158 n.17 (1970)); *United States v. Branella*, 972 F.Supp. 294, 300 (D.N.J. 1997),

and it nevertheless appearing the "Kohn Certification and Freedman Certification [were] accepted under Fed. R. Civ. P. 11 . . . and Fed. R. Civ. P. 56(g)," *see* 22 June 1999 Order and Opinion at 3-4 n.1, and it further appearing the Kohn and Freedman Certifications were substantively considered and analyzed in detail, as well as quoted or cited extensively throughout the 22 June 1999 Order and Opinion, *see id.* at 14-19, 22, 23, 24, 26, 41-42, 44, 45, 47, 53 and 71, and it further appearing various exhibits attached to the Kohn Certification also were substantively considered, analyzed, quoted and cited, *see id.* at 16 & n.10 and at 64 & n.27,[2]

and it further appearing Kohn has not identified any genuine issues of material fact sufficient to grant the Motion

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2. The Freedman Certification did not attach any exhibits. it appears, however, the deposition transcript of Kohn, submitted separately bv Freedman, also was substantively considered and cited in the 22 June 1999 Order and Opinion. *See* 22 June 1999 Order and Opinion at 4, 17.

for Reconsideration, and there appearing to be no reason why the Motion for Reconsideration should be granted, and for good cause shown,

IT IS, on this 20th day of July 1999,

ORDERED, that the Motion for Reconsideration be and hereby denied, and it is further

ORDERED, that this matter be and hereby is closed.

s/ Alfred J. Lechner, Jr.
ALFRED J. LECHNER, JR., U.S.D.J.